Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; GEORGE R. WHITE, Superintendent of the State Correctional Institution at Pittsburgh; and JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview,
Petitioners

v.

DONALD HARDCASTLE,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

QUESTION PRESENTED

1. Where a state supreme court has reviewed a claim of jury discrimination under Batson v. Kentucky[1], and found as a fact that the prosecutor did not discriminate, and where this conclusion is supported by the record, may a federal court consistently with the deferential habeas standard nevertheless reject that finding and substitute its own factual judgment because the state court supposedly did not fully "engage" the evidence or sufficiently explain "steps two and three" of the Batson burden-shifting process?

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit.)

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[1] 476 U.S. 79 (1986).

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ORDERS AND OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Third Circuit, affirming the district court's conclusion that the Pennsylvania Supreme Court decided this case unreasonably, and remanding for an evidentiary hearing, is dated May 14, 2004, and is reported at 368 F.3d 246 (3d Cir.).[2] It is also reprinted in the Appendix at App. 1-31. The June 27, 2001, memorandum and order of the district court granting the petition for writ of habeas corpus, as amended by order dated July 2, 2001, is reported at 2001 U.S. Dist. LEXIS 8556 (E.D. Pa.), and is reprinted in the Appendix at App. 32-73.

STATEMENT OF JURISDICTION

This is a federal habeas corpus proceeding brought by a Pennsylvania death-sentenced prisoner. Petitioners seek review of the order of the United States Court of Appeals of the Third Circuit dated May 14, 2004, granting the writ of habeas corpus in part and remanding to the district court for an evidentiary hearing. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1). Although this petition is technically interlocutory – because the habeas petition was not finally disposed of, one way or the other – this Court has recognized that *certiorari*

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[2] The Third Circuit originally released its opinion this case on May 11, 2004, but three days later the earlier opinion and judgment were vacated and others were issued in their place. This latter opinion was, for the first time, accompanied by a dissenting opinion. App. 1-31.

jurisdiction is properly exercised where the party seeking *certiorari* must otherwise submit to additional proceedings due to the erroneous interpretation of a fundamental question of law. See, e.g., Estelle v. Gamble, 429 U.S. 97, 98 (1976). See also Mazurek v. Armstrong, 520 U.S. 968, 975-76 (1997) (review of non-final order appropriate where decision below has produced immediate consequences to party seeking *certiorari*, and rests on a clearly erroneous interpretation of an important legal principle).

The immediate harm inflicted on the Commonwealth by the Third Circuit's remand order is not merely theoretical. In fact, following the Third Circuit's remand, the district court has already ordered broad discovery in this case: The Commonwealth has been directed to produce the prosecutor's handwritten jury selection notes, not only in this case, but apparently in *every homicide case* she prosecuted over her entire career – a span of some 30 years and hundreds of trials. The district court has also ordered Hardcastle's (retired) prosecutor, Judith Rubino, to submit to a pre-hearing deposition. Finally, the district court has ordered the District Attorney's Office to comb through its files and produce all documents in effect at the time of Hardcastle's trial in 1982 that reflect an office policy regarding the selection of juries.

In response to the district court's broad discovery order, the Commonwealth has filed a Petition for Writ of Mandamus in the Third Circuit (along with a notice of appeal from the discovery order). That petition has not yet been decided. For purposes of this *certiorari* petition, however, the point is that the Third Circuit's erroneous decision to overturn the state court judgment and remand this case for a federal hearing has resulted in immediate, vexatious, and unlawful litigation. *Certiorari* is appropriate at this stage.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, which provides, in relevant part:

> **Section 1.** ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d), which provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

STATEMENT OF THE CASE

In the early morning hours of May 23, 1982, firefighters found the charred bodies of Joseph Gregg, 57, and his longtime companion Ernestine Dennis, 60, in the bedroom of Gregg's North Philadelphia rowhouse. Mr. Gregg and Ms. Dennis had each been stabbed more than thirty times. The screen door in the front of the house had been ripped open, the house was in disarray, and officials later determined that three separate, intentional fires had been set inside. Meanwhile, police had little trouble identifying the murderer. Two separate eyewitnesses had seen respondent Donald Hardcastle acting suspiciously around the Dennis house before the murders, apparently trying to break into Mr. Gregg's car, which was parked in front. These witnesses knew Hardcastle from the neighborhood – there was no danger of misidentification. Another witness saw a man run out of the burning house a few minutes later, dressed identically to Hardcastle, carrying a box of liquor. (This particular witness could not identify the fleeing man.) A fourth eyewitness, who also knew Hardcastle, then recognized him about a block away, at the same time, dressed identically, running in the direction away from the burning house, carrying a box of liquor. When Hardcastle accidentally dropped the box, he even picked up a bottle of beer and offered it to this surprised late-night bystander. For his part, Hardcastle could only offer police a weak alibi that he was nowhere near the crime scene that night – which contradicted the testimony of all three eyewitnesses who *knew* him and *identified* him. See Commonwealth v. Hardcastle, 546 A.2d 1101, 1105-07 (Pa. 1988).

A Philadelphia jury convicted Hardcastle of first degree murder, arson, and burglary on December 8, 1982.

Following a penalty hearing, the same jury sentenced Holloway to death.

On February 24, 1983, an *en banc* panel of the Philadelphia Court of Common Pleas heard Hardcastle's post-verdict motions. The *en banc* panel rejected all but one of the claims as meritless. Two members of the panel, however, felt that the prosecutor unlawfully excluded black persons from the jury and awarded Hardcastle a new trial – even though Batson had not yet been decided, and the panel did not examine the racial composition of the venire, the nature of the case, or even the conduct of the prosecutor with any particularity (Opinion, Stout and Gelfand, J.J.). The trial judge, Judge Ivins, dissented. App. 7-8, 35-36.

The Commonwealth appealed the grant of a new trial to the Pennsylvania Superior Court, which reversed the *en banc* panel's decision and reinstated Hardcastle's convictions. Commonwealth v. Hardcastle, 494 A.2d 479 (Pa. Super. 1985). Hardcastle requested and was granted discretionary review in the Pennsylvania Supreme Court. On December 15, 1985, however, after the submission of briefs and oral argument, the Court dismissed the appeal as having been improvidently granted and remanded the case to the trial court. Commonwealth v. Hardcastle, 501 A.2d 249 (Pa. 1985). On February 18, 1986, the trial court formally imposed the two death sentences (one for each victim) and additional concurrent sentences of two and one-half to five years imprisonment for arson and burglary.

Hardcastle appealed the judgment of sentence to the state supreme court, claiming, *inter alia*, that the prosecutor discriminated against blacks through her use of peremptory challenges, thereby depriving Hardcastle of a representative

jury. While the appeal was pending, this Court issued Batson v. Kentucky, 476 U.S. 79 (1986), holding for the first time that defendants can challenge the prosecution's discriminatory use of peremptory challenges in a particular case. On August 10, 1988, Hardcastle's convictions and death sentences were affirmed by the Pennsylvania Supreme Court in a published opinion. Hardcastle, 546 A.2d 1101. The Court undertook its own review of the jury selection record and concluded, as a fact, that the prosecutor did *not* discriminate. Hardcastle then sought review in this Court; his petition for *certiorari* was denied on February 20, 1990. Hardcastle v. Pennsylvania, 493 U.S. 1093 (1990).

On September 13, 1990, Hardcastle filed a *pro se* petition under Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa. C.S.A. §9541 *et seq*. New counsel was appointed, and he filed amended and supplemental PCRA pleadings. After oral argument, the Honorable Joseph I. Papalini denied the PCRA petition on January 20, 1995. Hardcastle again appealed to the state supreme court, again claiming, *inter alia*, that there had been a Batson violation and that a new trial was required. On October 1, 1997, the state supreme court affirmed the denial of PCRA relief in a published opinion. Commonwealth v. Hardcastle, 701 A.2d 541 (Pa. 1997), reargument denied, January 2, 1998. The Court found that the issue of jury discrimination had been "finally litigated" on direct appeal, and therefore further review was not available. 701 A.2d at 548.

On December 30, 1998, Hardcastle filed a counseled, 156-page federal habeas petition and consolidated "preliminary" memorandum of law raising numerous claims. After the Commonwealth insisted that he make at least some showing that these claims had been exhausted, Hardcastle

filed an amended petition, dropping one unexhausted claim, on November 29, 1999. The Commonwealth filed a response on June 6, 2000. Hardcastle filed a 163-page reply brief on October 2, 2000. The Commonwealth filed a sur-reply on February 6, 2001. Oral argument in the district court spread over two days, on February 20-21, 2001.

On June 27, 2001, the district court granted the writ, conditioned on the Commonwealth's right to re-try Hardcastle within 180 days. App. 72-73. The court held that the state court's resolution of the jury discrimination claim was both an unreasonable application of, and contrary to, Batson v. Kentucky. The district court held, among other things, that the state appellate court should not have engaged in its own review of the *voir dire* record to find race-neutral reasons for the prosecutor's strikes. App. 55-56. Nevertheless, the district court then turned an abrupt about-face and undertook its own analysis of the *voir dire*, finding that the prosecutor discriminated. App. 67-69.

The Commonwealth appealed, arguing that the state supreme court's resolution of Hardcastle's Batson claim had been reasonable. The Third Circuit, however, affirmed the district court's decision to overturn the state court judgment, and remanded the case for a federal evidentiary hearing. App. 25-27.

The Third Circuit's decision not to defer to the state court has resulted in almost immediate consequences – unlawful and resource-draining litigation. The Commonwealth informed the district court of its plans to seek review by this Court, but the district court refused to wait for the outcome of this petition for *certiorari*. The court scheduled an evidentiary hearing for November, and in the

meantime granted Hardcastle's motion for extremely broad discovery, including the trial prosecutor's jury selection notes in *every homicide case* she prosecuted in her 30 years as an Assistant District Attorney. (This prosecutor has recently retired from city employment.) The Commonwealth is currently seeking a Writ of Mandamus from the Third Circuit to block this unjustified discovery order, and has filed a notice of appeal as well. These matters are currently pending before the Third Circuit. [3]

REASONS FOR GRANTING THE WRIT

In 1988, the Pennsylvania Supreme Court rejected Hardcastle's claim under Batson v. Kentucky that the trial prosecutor discriminated against African-Americans in her use of peremptory challenges. The Court carefully reviewed the record, and found that the prosecutor did not

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[3] After the Commonwealth filed its notice of appeal from the discovery order, the district court attempted to vacate the discovery order and substitute a more limited one, while reserving the question of the broader discovery requests to a later time. The Commonwealth believes, however, that the filing of the notice of appeal deprived the district court of jurisdiction to vacate its prior order; and because the district court did not conclusively deny the broad discovery requests, but simply postponed their consideration, the Commonwealth believes interlocutory review remains necessary. For present purposes, the point is that the Third Circuit's failure to abide by the rule of deference is the beginning of what promises to be long and difficult litigation.

discriminate.[4] This is exactly the kind of decision that must be deferred to under the federal habeas statute. See Hernandez v. New York, 500 U.S. 352, 364 (1991) (finding of discriminatory intent, or the absence of such intent, is factual conclusion accorded deference by reviewing court); Sumner v. Mata, 449 U.S. 539, 547-49 (1981) (presumption of correctness applies equally to factual findings made by state appellate courts); 28 U.S.C. § 2254(d)(2) (state factual findings must stand unless based on "unreasonable determination of the facts in light of the evidence presented in the State court proceeding"). See also Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) (federal court's review of state court's rejection of Batson claim is governed by habeas deference standard).

The Third Circuit, however, did not defer to this finding, or even characterize it as a factual finding at all. Rather, the panel transformed the issue into a legal labyrinth: Whether the state court followed a series of complicated analytical steps that, supposedly, Batson requires. Specifically, the Third Circuit held that the state court did not fully "engage" the evidence at Batson's third step, and did

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[4] In its 1988 decision, the Pennsylvania Supreme Court stated that Hardcastle had not made out a *prima facie* case of discrimination. 546 A.2d at 1105. Later, on collateral review, the Court clarified its holding, and explained that it had found *as a fact* that the prosecutor did not discriminate. 701 A.2d at 548. The Third Circuit accepted this latter characterization. App. 17.

not sufficiently separate and isolate the second and third steps in the Batson burden-shifting process.[5]

This was plainly a way of avoiding the real issue, which is relatively simple. The state supreme court was entitled to review the record and reject the claim as unsupported, as appellate courts often do. The only question now is whether the state court's determination that the prosecutor did *not* discriminate was a reasonable conclusion entitled to deference on federal habeas review.

This Court should grant *certiorari*, to affirm that the only question here is whether the state court's review of the record, and its rejection of this claim, was reasonable – which it was – and to affirm the principle that state appellate courts generally have the power to decide for themselves when a remand is (or is not) necessary.

In a more general sense, this Court should grant *certiorari* to underscore that Batson issues are not exempt from the deferential habeas standard. It is difficult, of course, to reliably adjudicate Batson facts decades after the

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[5] This Court has described the following three steps for admitting and considering evidence under Batson: (1) the opponent of the peremptory challenge must make out a *prima facie* case of racial discrimination; (2) the burden of production shifts to the defender of the strike to come forward with a race-neutral explanation; and (3) the court must decide whether the opponent of the strike has proved purposeful racial discrimination. Purkett v. Elem, 514 U.S. 765, 767 (1995).

trial is over, especially if the defendant did not seek to make a complete record contemporaneously. For that reason, deference to prior state court decisions is especially important here. But the Third Circuit has found several ways to transform Batson into a series of rigid requirements that, in its view, are often violated and thus lead to *de novo* adjudication of facts and law.[6] This case is the latest of these decisions, and the Third Circuit's approach is unlawful.

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[6] In recent months, a number of federal courts in the Third Circuit have overturned state convictions – some, like this one, more than twenty years old – on claims of jury discrimination. See Holloway v. Horn, 355 F.3d 707 (3d Cir. 2004) (new trial granted on Batson grounds because, *inter alia*, Commonwealth's evidence that prosecutor had accepted some African-American jurors was irrelevant); Wilson v. Beard, 314 F. Supp.2d 434 (E.D. Pa. 2004) (granting habeas relief despite complete absence of any *voir dire* transcript from 1984 trial). Other cases are still pending, but seem poised for the same result. Brinson v. Vaughn, No. 02-4466 (3d Cir.) (oral argument held Sept. 14, 2004; panel troubled by prospect of denying any review of Batson claim, despite clear untimeliness of habeas petition and procedural default of claim). In still other cases, the federal courts have ordered discovery so that state prisoners may create better Batson claims, years after state litigation has ended. See Hardcastle v. Horn, No. 98-cv-3028 (E.D. Pa.) (order of district court, dated August 18, 2004, following remand at issue here, directing prosecutor to produce all her jury selection notes in all of her homicide cases); Marshall v. Beard, 2004 U.S. Dist. LEXIS 17507 (E.D. Pa. 2004) (granting discovery on Batson claim from 1984 murder trial despite state court's finding that claim had been waived because Marshall had failed to raise it

(continued ...)

I. The Pennsylvania Supreme Court's decision was a reasonable resolution of the claim before it.

Under the current habeas statute, "the only question that matters" is whether the Pennsylvania Supreme Court's resolution of Hardcastle's Batson claim was a reasonable application of this Court's precedent, and a reasonable interpretation of the facts in the record. Lockyer v. Andrade, 538 U.S. 63, 71 (2003).[7] See also 28 U.S.C. § 2254(d)(1) and (2). This Court has repeatedly and firmly emphasized that an "unreasonable" decision is more than merely incorrect – it is a decision that no reasonable jurist would have made. E.g., Woodford v. Visciotti, 537 U.S. 19, 24-25 (2002). Whether a particular decision is "unreasonable" must be assessed "in light of the record the court had before it." Holland v. Jackson, 124 S. Ct. 2736, 2737-38 (2004). The

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at trial or on direct appeal). In *all* of these cases, the Batson claims were rejected by the state courts years ago, but the federal courts have nevertheless found ways to address the claims *de novo*. Holloway is especially relevant – as in this case, the Third Circuit there severely constricted the kinds of evidence a prosecutor can rely on in defending a Batson claim. The Commonwealth has filed a Petition for Writ of Certiorari in Holloway, which is currently pending in this Court.

[7] The "contrary to" prong of section 2254(d)(1) does not apply where the state court has identified the correct governing legal principle but is alleged to have unreasonably applied it. Williams, 529 U.S. at 413. Thus, the dispute is whether the state court's application of Batson was unreasonable.

legal authority against which the state court's decision must be measured is limited to *the decisions of this Court at the time of the state court opinion under review.* Williams v. Taylor, 529 U.S. 362, 412 (2000).

Hardcastle's trial took place in 1982, before Batson was decided. His trial counsel did not make a Batson-style objection during the five-day *voir dire*, and neither he nor the trial court asked the prosecutor to explain her peremptory challenges. It was only after the end of *voir dire* that Hardcastle's counsel finally made a claim that the prosecutor had discriminated against African-Americans through her use of peremptory strikes. The delay was especially important, because the judge who presided over *voir dire* had fallen ill and was replaced; the new judge heard and denied Hardcastle's claim of jury discrimination several days later, just moments before the trial began. App. 76-82. Hardcastle's counsel did not ask for a hearing, or request that the prosecutor explain anything. Instead, Hardcastle simply asserted that the prosecutor had used twelve of her fourteen peremptory challenges to strike African-Americans from the jury (a number that later proved to be wrong[8]), he alleged that these numbers alone proved discrimination, and he requested a mistrial. App. 74-75 (written motion for mistrial submitted to trial court); 76-82 (oral argument on motion for mistrial). He did not cite any law in support of this motion, even from other jurisdictions. The prosecutor asked for a chance to respond to these charges, but the new trial judge

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[8] In reality, the prosecutor exercised fifteen peremptory challenges. App. 65. She was entitled to use more, but did not. 546 A.2d at 1105.

believed a response was not necessary, and denied the claim, based on his understanding of then-current (pre-Batson) law. App. 82.

That was the extent of the factual record when the claim finally came before the Pennsylvania Supreme Court several years later. Batson had been decided in the meantime. Hardcastle did not request a remand or an evidentiary hearing, but instead insisted that under Batson he had proven his entitlement to a new trial based on the record as it stood.[9] The Court acknowledged that the matter posed a "difficult problem for review" because no orderly Batson hearing had been requested or held during *voir dire*. 546 A.2d at 1104. The Court decided to undertake its own review

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[9] Hardcastle argued before the Third Circuit that he *did* ask the Pennsylvania Supreme Court for a hearing, but a reasonable review of the briefs before that Court suggests otherwise. While at times he complained that he had not been given a "hearing" by his testy trial judge – in other words, his lawyer had not been able to make a full argument – the actual request for relief said nothing about a hearing or a remand. Hardcastle only requested a new trial. Furthermore, in Hardcastle's last filing before the Pennsylvania Supreme Court – a Supplemental Brief filed specifically to take advantage of Batson, then newly decided – he argued only that he had *already proven* discrimination within the meaning of the new case, and was entitled to a new trial. App. 83-87.

In sum, Hardcastle invited the Pennsylvania Supreme Court to decide the case on the record – and the Court did so, though not to his liking.

of the record, and found obvious race neutral reasons for ten of the prosecutor's twelve peremptory challenges to black jurors. Id. At 1104-05. That left just two challenges against African-Americans that had no obvious race neutral basis. But there was no evidence to the contrary, either – nothing else in the record suggested that these peremptory challenges were the result of racial bias. In fact, the record as a whole suggested the opposite. This was not a racially-charged case. The defendant and the victims were all black, as were most of the Commonwealth's witnesses (including two of Mr. Gregg's sons, one a Philadelphia police officer). Further, as the Pennsylvania Supreme Court noted, the prosecutor accepted two other African-American venirepersons as jurors – one who ultimately sat on the jury, and another who was challenged by the defense. At the end of the *voir dire*, the prosecutor had several unused peremptory challenges remaining, so she *could* have rejected every black juror, but she did not. 546 A.2d at 1105. The Court further noted that other important facts were not captured by the record – for example, the demeanor of the people in the courtroom. In the absence of evidence of discrimination, and after identifying plain race-neutral reasons for almost every one of the prosecutor's peremptory challenges, the Court reasonably inferred that the prosecutor did *not* discriminate. Id.

That was a perfectly appropriate way of deciding this claim, especially in light of then-current law. At the time of the Pennsylvania Supreme Court's decision in 1988, this Court had only issued three opinions concerning application of the Batson rule – Batson itself, and two cases concerning its applicability to older convictions and trials. See Allen v. Hardy, 478 U.S. 255 (1986) (Batson not retroactive to final judgments), and Griffith v. Kentucky, 479 U.S. 314 (1986) (Batson applicable to cases on direct appeal at the time it was

issued). There was certainly nothing in Batson itself suggesting that the Pennsylvania Supreme Court was prohibited from reviewing the record and rejecting this claim of discrimination. Nor do these cases suggest that the state court's ultimate finding – that the prosecutor did not discriminate – was an unreasonable interpretation of the record before it. On the contrary, this Court explicitly declined to anticipate all of the different circumstances in which these new claims might arise; the Batson opinion stressed that its implementation would necessarily be flexible, and was properly left to individual jurisdictions and case-by-case development. Batson, 476 U.S. at 99 & n.24.

Neither Allen nor Griffith constricted that flexibility. Instead, the Court explicitly recognized the inherent difficulty, and possible unfairness, of applying Batson to older cases. Allen, 478 U.S. at 260. Indeed, this Court was sharply divided as to whether Batson should be applied *at all* to trials that had already taken place, even where the judgments had not yet become final. See Griffith, 479 U.S. at 329 (Rehnquist, C.J., dissenting), 329-34 (White, J., dissenting, joined by Rehnquist, C.J., and O'Connor, J.). This Court's recognition of the problems associated with retroactive application suggests, and certainly suggested in 1988, that it would *encourage* courts to be creative in their approach, to avoid as much unfairness as possible. If, for example, an appellate court believed after reviewing the record that the prosecutor did not discriminate, there is nothing in these cases requiring a pointless remand for a hearing.

It is, of course, a well-settled principle of appellate review that an appeals court may address a factual issue that was not decided below, if the briefing and the record are

sufficient. See, e.g., Denver v. Denver Union Water Co., 246 U.S. 178 (1918). Nothing in Batson, Allen, or Griffith suggests that this principle is overridden where jury discrimination is at issue. Nor is there anything about the three-step burden-shifting process described in Batson that would strip away the power of appellate courts to decide a case like this one. As this Court made clear in Title VII cases – from which the three-step discrimination burden-shifting process was borrowed – the three steps should not be applied rigidly, or in such a way as to complicate, rather than ease, the resolution of the "ultimate question" of discrimination. United Postal Service Bd. Of Governors v. Aiken, 460 U.S. 711, 716 (1983). The three-step process is not an end in itself; it is a means by which a court can manage the arguments and evidence associated with a Batson claim, so that in the end it can reach a reliable conclusion about the presence (or absence) of discrimination. If the court believes that it can reliably reject such a claim without recourse to a hearing, then it should be able to deny relief without holding one.[10]

In fact, this approach is *still* patently reasonable, even under current law. Courts across the country have held that an appellate court may review the *voir dire* record and reject a Batson claim – even where there is a *prima facie* case of

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[10] At the very least, without an express statement to the contrary from this Court, the state court's approach (and its conclusion) was reasonable. See Mitchell v. Esparza, 124 S. Ct. 7, 10 (2004) ("A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous").

discrimination – without a remand and without any testimony from the prosecutor. See, e.g., Mahaffey v. Page, 162 F.3d 481, 483 n.1 (7th Cir. 1998) (recognizing that "apparent [race-neutral] reasons may "negate an inference of discrimination"), cert. denied, 526 U.S. 1127 (1999); Johnson v. Campbell, 92 F.3d 951, 953-54 (9th cir. 1996) (considering "obvious reason" for peremptory challenge apparent from record); Capers v. Singletary, 989 F.2d 442, 446-47 (11th Cir. 1993) ("Guided by Batson ..., we conclude that the district court did not err by considering the probable reasons for the state's challenges when determining whether the defendants had established a prima facie showing"); Rodriguez v. Lord, 2001 U.S. Dist. LEXIS 16524 (October 15, 2001) ("courts may consider race-neutral or gender-neutral reasons for striking a juror apparent in the record of the voir dire").

In sum, the Pennsylvania Supreme Court's rejection of Hardcastle's Batson claim was based on a reasonable interpretation of the factual record before it; the Court's denial of the claim was also a reasonable application of this Court's precedent.

II. The two supposed mistakes in the state court's reasoning, as identified by the Third Circuit, were not mistakes at all, and did not render unreasonable the state supreme court's factual finding.

The Third Circuit identified two supposed failings in the state court's analysis that, it assures us, removed any obligation to defer to the state court's findings. These two alleged errors are unconvincing, however. At bottom, both "mistakes" are simply factual disagreements – that is, the

Third Circuit disagreed with the state supreme court's conclusion that no discrimination had occurred.

1. The Pennsylvania Supreme Court "engaged" the evidence. The Third Circuit reiterated its rule that the reviewing court must "address and evaluate all evidence introduced by each side (including all evidence introduced in the first and second steps)" that tends to prove or disprove the Batson claim. App. 23, quoting Riley v. Taylor, 277 F.3d 261, 286 (3d Cir. 2001) (*en banc*; reversing panel decision by vote of 7-5). This rule sounds unobjectionable, but apparently it can lead to a trap. Here, the Court of Appeals held that the state supreme court failed to fully "engage" the evidence, and so the "step three" Batson determination was inadequate. App. 24.

It is hard to know what this means. It cannot mean that the Pennsylvania Supreme Court failed to consider a particular piece of evidence, because the Third Circuit does not identify any evidence that the state court *should* have considered but *did not*. On the other hand, it cannot mean that the state court should have written a better or more thorough opinion – there is no such prerequisite to AEDPA review, and in any event the state supreme court's opinion is perfectly clear. See Early v. Packer, 537 U.S. 3, 7-8 (2002) (state court opinion need not cite, or even be aware of, relevant Supreme Court precedent in order to qualify for deference); Wright v. Moore, 278 F.3d 1245, 1255-56 (5th Cir. 2002) ("state court decision that does not rest on procedural grounds alone is an adjudication on the merits regardless of the form in which it is expressed"). Perhaps the Third Circuit's concern was one of timing – the state supreme court may have considered the evidence before it, but did not "engage" the evidence while assessing the

credibility of the race neutral reasons it found in the record. This makes even less sense. The state supreme court found that the race-neutral reasons it identified from the record were credible as it identified them. If the Court had *not* thought them credible, it would *not* have identified them. The Pennsylvania Supreme Court was not required to stop at that point in its analysis and re-decide the credibility issue while weighing these explanations against other (unnamed) facts.

In the end, the state court's alleged failure to "engage" the evidence seems to mean that, in the opinion of the Court of Appeals, the state court did not sufficiently *wrestle* with the question – it should not have come to a conclusion so quickly, it should have expressed more concern about the possibility of discrimination, and its concerns should not have been put to rest by the race-neutral reasons it identified in the transcript of the *voir dire*. But this is simply another way to spin a factual disagreement. The Pennsylvania Supreme Court was confident that there was no discrimination, so there was no need to "engage" the evidence, or weigh the evidence, any more than it did. The fact that the state court did not seem more impressed with the claim does not mean the Court did not decide it.

In reality, the Pennsylvania Supreme Court plainly "engaged" the evidence before it – the prosecutor's use of peremptory strikes (including the African-American venirepersons she accepted and rejected), plus the race-neutral reasons for her strikes that were apparent from the transcribed *voir dire*. The Court also "engaged" other circumstances – that the prosecutor could have struck all black venirepersons but accepted two, "one of whom was ironically challenged by the defendant". Hardcastle, 546

A.2d at 1105. The Third Circuit does not say what else was required. There is no constitutional principle obligating the state court to be more *reluctant*.

The "failure to engage the evidence" holding is, thus, a red herring. The Pennsylvania Supreme Court clearly explained its denial of relief, and even the Third Circuit cannot point to any other piece of evidence that the state court should have taken into account. The real problem is that the Third Circuit disagrees with the state court's conclusion that the Batson claim could be denied on the existing record, not whether the state court "engaged" the evidence in some abstract sense. But that question is governed by the habeas deference standard – that is, the issue is not whether the state court was *correct* in rejecting the claim on the record, but whether it was *reasonable* in doing so. Because the reasons given by the state court for rejecting this claim are all firmly supported by the record, and because these reasons, taken together, provide a reasonable basis for rejecting the Batson claim, the state court's decision should be upheld.

2. The Third Circuit's insistence on "separation" between Batson steps two and three prevented it from properly deferring to the factual conclusions of the Pennsylvania Supreme Court. The Third Circuit also held that the state supreme court did not sufficiently "maintain[] the analytical distinction between steps two and three" of the Batson process. App. 20. According to the Court of Appeals, the Pennsylvania Supreme Court was obligated to maintain this "analytical distinction" at all times, even after the Court had found obvious race neutral reasons for ten of the prosecution's twelve peremptory strikes against African-Americans. This requirement, however, is simply a different

way in which the Third Circuit managed to avoid deference to the state supreme court's factual findings.

With respect to the final two challenges – identified by the Third Circuit as "Venirepersons 11 and 12" – the Pennsylvania Supreme Court simply made a different kind of factual inference. Because the Court believed that the first ten jurors had *not* been discriminated against, and because there was nothing else in the record suggesting the presence of discrimination, the Court inferred that these final two jurors were not the victims of discrimination, either. This is a common way to use circumstantial evidence to resolve a factual question. For example, if the Court had found the opposite – that the prosecutor had acted suspiciously with respect to those other ten jurors, or otherwise had approached black jurors differently – then the Court could have inferred that she was discriminating against these last two jurors as well. This is just the flipside: The *absence* of discrimination elsewhere in the record makes it *less likely* that she was discriminating against Venirepersons 11 and 12.

The Court's inference with respect to these last two jurors is thus entitled to deference under the AEDPA standard. The Third Circuit's insistence on an "analytical distinction" between Batson steps two and three, however, is the opposite of deference – it effectively blocks the state court's inference as illegitimate. In the Third Circuit's view, the state court *could not* infer the absence of discrimination against Venirepersons 11 and 12 from the absence of discrimination against Venierpersons 1 through 10, and from the other circumstances revealed by the record. The state court could *only* reject claims of bias against Venirepersons 11 and 12 through articulation of separate, race-neutral

reasons for each of these jurors, whatever the rest of the trial record might have shown.

The Third Circuit's mistake is twofold. Most fundamentally, the court failed to admit that the state court reached a factual conclusion with respect to these last two jurors, just as with the other ten. The Pennsylvania Supreme Court did not end the inquiry prematurely, or otherwise abandon Batson mid-stream; the Court fully rejected the allegation of discrimination. Second, the Third Circuit was overly preoccupied with identifying the three Batson burden-shifting steps. This preoccupation obscured the real question – whether the state supreme court's factual conclusion was reasonable.

In focusing exclusively on the three-step process, the Third Circuit confused the means with the end. The ultimate question here is not whether the three Batson steps have been identified and separated, but whether Hardcastle's jury was chosen through discriminatory means. The three-step process was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the question of discrimination." United States Postal Service Bd. Of Governors v. Aikens, 460 U.S. 711, 715 (1983) (explaining three-step burden-shifting process under Title VII; cited with approval in Batson, 476 U.S. at 94). See also Purkett v. Elem, 514 U.S. 765, 777 (1995) (Stevens, J., dissenting) ("preoccupation with the niceties of a three-step analysis should not foreclose meaningful judicial review"). This Court warned in Aikens that reviewing courts should not "treat discrimination differently from other ultimate questions of fact," 460 U.S. at 716, and the Pennsylvania Supreme Court followed that advice here. It

believed that the trial record did not support the bias claim, and accordingly it rejected the claim – just like any other kind of case.

As this Court has recognized, the question of discrimination is difficult enough; appellate courts should not "make their inquiry even more difficult by applying legal rules which were devised to govern the basic allocation of burdens and order of presentation of proof ... in deciding the ultimate question." Id., 460 U.S. at 716 (citation omitted). The Batson three-step process was obviously designed for objections raised when they are supposed to be raised, that is, during *voir dire*. But once the jury has been selected, the trial is over, and the review process begins, the issue can be complicated by overly-technical efforts to tease out each of the three steps.[11] That is especially true here, because the

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[11] The only Supreme Court authority on this point cited by the Third Circuit is Purkett v. Elem, 514 U.S. 765, 767-68 (1995) (*per curiam*). But Purkett illustrates the point. There, the prosecutor had offered a race-neutral explanation for the disputed peremptory challenges – facial hair – but the Eighth Circuit held this was not sufficiently credible to meet the requirements of Batson step two. This Court reversed, stressing that credibility is reserved for step three – the ultimate question of discrimination – rather than step two, which is merely a burden of *production* for the prosecution. This Court emphasized that analytical separation of these steps ensures that the ultimate burden of proving bias always remains with the Batson claimant.

But the Third Circuit's insistence on separating steps two and three in this case accomplishes the opposite – it

(continued ...)

prosecution was not asked to provide any explanation during *voir dire*. The Third Circuit's emphasis on Batson step two ignores this reality, and requires the reviewing court to somehow meet the prosecution's burden of production some twenty years after the trial ended, or else award automatic relief. This is not a reliable way to decide anything.

The Pennsylvania Supreme Court recognized that this case posed a "difficult problem for review," App. 8, but ultimately believed it could resolve the ultimate question on the record as it stood. That is the decision properly under review here; the "only question that matters" is whether this holding was an unreasonable interpretation of the record before it. Lockyer, 538 U.S. at 71; 28 U.S.C. § 2254(d). By faulting the state court for failing to "engage" unnamed evidence, or for failing sufficiently to separate the second and third Batson steps, the Third Circuit has improperly transformed the issue from a simple deference question into a technical and unreliable parsing of the burden-shifting process decades after the trial ended. This is, at its core, an

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creates a way to ignore the Pennsylvania Supreme Court's factual finding that Hardcastle did *not* meet his ultimate burden of proving discrimination. This method of analysis makes it easier for Hardcastle to win, despite his burden, because it removes an entire category of circumstantial evidence from the court's consideration.

In any event, of course, Purkett was decided six years *after* the Pennsylvania Supreme Court rejected this Batson claim, so it was not part of the legal landscape at the time of the state court decision.

unlawful means of engaging in *de novo* review of a Batson claim that is more than twenty years old.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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App. 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-9006

DONALD HARDCASTLE

v.

MARTIN HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; GEORGE R. WHITE, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT PITTSBURGH; AND JOSEPH P. MAZURKIEWICZ, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW,

Appellants

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 98-cv-03028)
District Judge: Honorable John R. Padova

Argued on May 20, 2003

Before: SCIRICA, *Chief Judge*, NYGAARD and ROTH, *Circuit Judges.*

JUDGMENT

This case came on to be heard on the record before the United States District Court for the Eastern District of Pennsylvania and was argued on May 20, 2003;

On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated July 2, 2001, the Court will vacate the final judgment of the District Court and remand the matter for further proceedings consistent with this opinion.

All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: May 14, 2004

PRECEDENTIAL

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No: 01-9006

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Argued on May 20, 2003

Before: SCIRICA, *Chief Judge*, NYGAARD and ROTH, *Circuit Judges*

(Filed May 14, 2004)

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OPINION

ROTH, *Circuit Judge*:

In 1982, Donald Hardcastle was charged by the Philadelphia District Attorney's Office with murder, arson, and burglary. He was tried before a jury in the Court of Common Pleas, convicted on all counts, and sentenced to death. In both his direct appeal and state collateral review proceedings, Hardcastle asserted, *inter alia*, that the assistant district attorney who conducted the jury selection at his trial exercised her

peremptory strikes in a racially discriminatory manner, thus violating the constitutional principle recognized by the Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), and made applicable to Hardcastle's then-pending direct appeal by *Griffith v. Kentucky*, 479 U.S. 314 (1987). The Pennsylvania Supreme Court twice rejected Hardcastle's *Batson* claim and affirmed his conviction.

Hardcastle then filed a petition for a writ of habeas corpus with the U.S. District Court. The District Court concluded that the Pennsylvania Supreme Court's ruling was both contrary to and an unreasonable application of *Batson*, granted Hardcastle's petition, and ordered a new trial. For the reasons set forth below, we hold that the Pennsylvania Supreme Court's rejection of Hardcastle's claim on the record before it was indeed an objectively unreasonable application of *Batson*. However, because the Commonwealth of Pennsylvania had requested, and been denied, a chance to present evidence in support of its peremptory strikes of African-Americans from the venire, it is entitled to a hearing to present that evidence. We will, therefore, remand this matter to the District Court to hold such a hearing and to then reexamine the application of *Batson* to Hardcastle's claim.

I. Factual Background and Procedural History

The following material facts are drawn from the opinions issued in this case by the Pennsylvania Supreme Court and the United States District Court for the Eastern District of Pennsylvania. *See Commonwealth v. Hardcastle*, 546 A.2d 1101 (Pa. 1988) (direct appeal proceedings) (*Hardcastle I*); *Commonwealth v. Hardcastle*, 701 A.2d 541 (Pa. 1998) (appeal of post-conviction relief proceedings)

(*Hardcastle II*); *Hardcastle v. Horn*, No. 98-CV-3028, 2001 WL 722781 (E.D. Pa. June 27, 2001) (federal habeas corpus proceedings) (*Hardcastle III*). They are not in dispute.

On May 23, 1982, the bodies of Joseph Gregg and Ernestine Dennis were found in Gregg's Philadelphia home. Both had received in excess of thirty stab wounds and Gregg's home had been set on fire. Several neighbors indicated that they had seen Hardcastle near Gregg's home around the time of the murders. An arrest warrant was issued and Hardcastle surrendered to the police on May 25. He was subsequently charged with burglary, two counts of arson, and two counts of murder.

Hardcastle is an African-American. During the course of jury selection at his trial, the prosecutor used her peremptory strikes, of which she had a total of twenty, to remove twelve of the fourteen African-American members of the venire. The jury ultimately empaneled to hear the case contained only one African-American. Hardcastle's trial counsel did not object to the Commonwealth's peremptory challenges during the five-day *voir dire*, and the trial court therefore did not require the prosecutor to state the bases for her strikes on the record. However, following *voir dire*, Hardcastle's counsel moved for a mistrial on the grounds that the prosecutor's use of the peremptory challenges violated both the state and federal constitutions. Applying the then-governing standard articulated in *Swain v. Alabama*, 380 U.S. 202 (1965), the trial court denied this motion. The trial court similarly denied the prosecutor's request for permission to state her reasons for the challenged strikes on the record.[1]

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[1] The following exchange occurred in connection with the trial court's denial of Hardcastle's motion for a mistrial following

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After trial, Hardcastle was convicted of two counts of first degree murder, two counts of arson, and one count of burglary. Post-trial motions were filed, arguing, *inter alia*, that the prosecutor exercised her peremptory strikes in a discriminatory manner, thus violating Hardcastle's constitutional rights. A three-judge *en banc* panel of the Court of Common Pleas was convened to hear the post-trial motions. At this hearing, counsel for Hardcastle repeatedly requested an evidentiary hearing on the discriminatory strikes. In reply, the Assistant District Attorney stated that, in view of the fact that the trial had occurred six months earlier, she could not offer reasons for her strikes of black jurors and that it was no longer possible to reconstruct the voir dire. An evidentiary

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voir dire:

> The Court: [Defense Counsel], I'm not going to argue the point. There's no need to. I'm going to deny your motion. Your record is correct, and we now proceed. Is there any other motion?
>
> [Prosecutor]: May I put something on the record with regard to this issue?
>
> The Court: No.
>
> [Prosecutor]: Not in defense.
>
> The Court: No.
>
> [Prosecutor]: Okay.
>
> The Court: Now that gets rid of the problem.

hearing was not granted but the panel, by a two to one vote, granted Hardcastle a new trial on the jury selection issue.

On appeal, the Pennsylvania Superior Court reversed the grant of a new trial and affirmed the conviction, holding that Hardcastle failed to make the showing required by the then-governing standard established in *Swain*. The Pennsylvania Supreme Court initially granted allocatur but then dismissed the appeal as improvidently granted. On remand, Hardcastle was sentenced to death for the murders of Gregg and Dennis, to 2 ½ to 5 years for arson, and to 2 ½ to 5 years for burglary.

Following sentencing, Hardcastle again appealed to the Pennsylvania Supreme Court. By the time his case was heard by that court in November 1987, the United States Supreme Court had issued its decision in *Batson*, thereby lessening the evidentiary burden imposed on defendants in Hardcastle's position. As noted by the Pennsylvania Supreme Court, this change in controlling precedent complicated its task:

> The case before us presents a difficult problem for review. Since the Supreme Court's decision in *Batson* post-dates appellant's judgment of sentence, the defense did not object to the prosecutor's use of peremptory challenges at the time of voir dire, the prosecution did not rebut the objection, and the trial court did not rule on the issue. Defense counsel did, however, preserve the issue by making a motion for a mistrial, subsequent to voir dire and prior to trial, based on the prosecutor's impermissible use of the challenges. Because the issue was preserved appellant is entitled to

> the protections granted by *Batson*. Therefore, we must make a *post hoc* evaluation of the record, examining each of the Commonwealth's fourteen peremptory challenges to determine whether appellant has made out a prima facie case of improper use.

Hardcastle I, 546 A.2d at 1104 (citation and footnote omitted).

However, rather than remanding the case to the trial court for an evidentiary hearing, the Pennsylvania Supreme Court combed through the record itself in an effort to determine whether race-neutral bases existed for the challenged strikes. After conducting this analysis, it identified the following as potential bases for the dismissal of Venirepersons 1 through 10:[2] (1) the first had a sister that had been

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[2] For ease of reference, the first ten African-Americans struck from the venire (for whom the Pennsylvania Supreme Court proffered relatively specific race-neutral justifications) will be referred to throughout this Opinion as "Venirepersons 1 through 10." The last two African-Americans struck from the venire (for whom the Pennsylvania Supreme Court proffered only general race-neutral justifications) will be referred to as "Venirepersons 11 and 12."

Additionally, we note the discussion by the District Court and the parties regarding the fact that one of the first ten venirepersons discussed by the Pennsylvania Supreme Court may not have been an African-American, and the possibility that the Pennsylvania Supreme Court may therefore have offered explanations for only the first nine African-Americans struck from the venire. *See Hardcastle III*, 2001 WL 722781 at *14-* 15. We take no position with respect to this issue, as it in no way affects the

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raped several years before Hardcastle's trial; (2) the second admitted during *voir dire* that she had heard about the case through media reports; (3) the third was questioned in detail by both sides about her work in caring for delinquent children, her education, and her family history; the court noted that this extensive questioning "gave the Commonwealth attorney ample opportunity to observe responses and demeanor"; (4) the fourth had a sister and nephew who had been arrested for drug-related crimes, as well as a father who had been a victim in a separate crime; (5) the fifth "initially testified that she would not follow the judge's instructions if she felt that something else was better law," but later stated after further questioning that she would follow the judge's instructions; (6) the sixth had attended her brother's trial, in which he was convicted on robbery charges; (7) the seventh was a case-worker for the Commonwealth and had a brother who had been a victim of violent crime; (8) the eighth was a registered nurse who had six children, one of whom, a son, had been convicted of rape; (9) the ninth was a twenty-year-old unemployed high school graduate; and (10) the tenth was a thirty-five-year-old single bartender who initially indicated that he would do whatever he thought was right, but later stated that he would follow the judge's instructions. *Hardcastle I*, 546 A.2d at 1104-05.

In turning next to Venirepersons 11 and 12, the court concluded these strikes were justified by more general "race-neutral" explanations, finding that "the Commonwealth had the opportunity to observe the witnesses and their response to questioning prior to exercising the peremptory challenge"

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outcome of this appeal. However, for ease of reference, we will assume that all of the potential jurors identified and discussed by the Pennsylvania Supreme Court were in fact African-Americans.

and that "although the Commonwealth had ample challenges remaining, there were no challenges offered to two black jurors, one of whom ironically was challenged by the defendant." *Id.* at 1105. Based on the foregoing, the Pennsylvania Supreme Court concluded that Hardcastle failed to establish a *prima facie* case of improper use of peremptory challenges under *Batson*. *Id.* The court similarly rejected the remaining claims raised by Hardcastle on direct appeal and affirmed both his conviction and sentence.

When again presented with the *Batson* claim in considering Hardcastle's appeal of the denial of his Post Conviction Relief Act (PCRA) claim, *see* 42 Pa.C.S. § 9541 *et seq.*, the Pennsylvania Supreme Court refused to exempt Hardcastle from the requirement that claims raised in PCRA proceedings must not have been previously litigated. The court therefore rejected his claim that intervening decisions of the United States Supreme Court required it to reach a different conclusion on collateral review than it had on direct review: "if finality means anything it must mean that our decision on the merits in this case, as to which certiorari was denied by the United States Supreme Court, cannot be affected by decisions in other cases decided three and four years later." *Id.*

Following exhaustion of his state remedies, Hardcastle sought a writ of habeas corpus from the United States District Court for the Eastern District of Pennsylvania. Although the petition raised unexhausted claims, both sides conceded that procedural bars prevented Hardcastle from raising his unexhausted claims in state court. Accordingly, the District Court held that Hardcastle's petition was not a mixed petition and thus was not subject to dismissal. *Hardcastle III*, 2001 WL 722781 at *3. Following a thorough analysis of the merits, the District Court further held that the Pennsylvania Supreme Court's resolution of

Hardcastle's claim was both contrary to and an unreasonable application of *Batson*. It therefore granted the writ and, after concluding that an evidentiary hearing would not be helpful, ordered a new trial. *Id.* at *19. This appeal followed.

II. Jurisdiction

The District Court exercised jurisdiction over Hardcastle's petition for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254. We have jurisdiction to review the District Court's final order granting Hardcastle's petition pursuant to 28 U.S.C. §§ 1291 and 2253. The Commonwealth is not required to obtain a certificate of appealability prior to seeking review of a District Court's decision to grant a petition for a writ of habeas corpus. *Cristin v. Brennan*, 281 F.3d 404, 409 (3d Cir. 2002) (citing Fed. R. App. P. 22 (b)(3)).

III. Standard of Review

Because the District Court "d[id] not hold an evidentiary hearing and engage in independent fact-finding, but rather limit[ed] the habeas evidence to that found in the state court record," our review of its final judgment is plenary. *Scarbrough v. Johnson*, 300 F.3d 302, 305 (3d Cir. 2002).

Hardcastle's petition for a writ of habeas corpus was filed after April 1996 and thus is subject to the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2241 *et seq.* (AEDPA). *Gattis v. Snyder*, 278 F.3d 222, 228 (3d Cir. 2002). "Under AEDPA, when a federal court reviews a state court's ruling on federal law, or its application of federal law to a particular set of facts, the state court's decision must stand unless it is 'contrary to, or an unreasonable application of, clearly established Federal law, as determined by the

Supreme Court of the United States.'" *Lam v. Kelchner*, 304 F.3d 256, 263 (3d Cir. 2002) (quoting 28 U.S.C. § 2254 (d)(1)). "When a federal court reviews a state court's findings of fact, its decision must stand unless 'it was based on an unreasonable determination of the facts in light of the evidence presented in a State court proceeding.'" *Id.* (quoting 28 U.S.C. § 2254(d)(2)).

It is by now well-settled that *Batson* claims constitute mixed questions of law and fact for purposes of federal habeas corpus review. *See Riley v. Taylor*, 277 F.3d 261, 277-78 (3d Cir. 2001) (*en banc*). The governing standard for such determinations is provided by the Supreme Court's decision in *Williams v. Taylor*, 529 U.S. 362 (2000). Under *Williams*, "a state court decision is 'contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Court's] cases' or 'if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Court] and nevertheless arrives at a result different from [its] precedent.'" *Lockyer v. Andrade*, — U.S. —, 123 S. Ct. 1166, 1173 (2003) (quoting *Williams*, 529 U.S. at 405-06).

State court determinations of mixed questions of law and fact constitute an "unreasonable application" of clearly established federal law when "'the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.'" *Id.* at 1174 (quoting *Williams*, 529 U.S. at 413). Under the "unreasonable application" clause, "[t]he state court's application of clearly established law must be objectively unreasonable"; a decision that is merely "incorrect or erroneous" is insufficient to justify relief. *Id.* As the Supreme Court recently clarified, "objectively unreasonable" is not synonymous with "clear error," as "[t]he

gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Id.* at 1175.

Thus, "[i]t is not enough that a federal habeas court, in its 'independent review of the legal question' is left with a 'firm conviction' that the state court was 'erroneous.'" *Id.* (citation omitted). "Rather, that application must be objectively unreasonable." *Id.* Stated a different way, a "'federal habeas court should not grant the petition unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent.'" *Werts v. Vaughn*, 228 F.3d 178, 197 (3d Cir. 2000) (quoting *Mateo*, 171 F.3d at 890).

IV. Discussion

We begin by noting our agreement with the Pennsylvania Supreme Court's observation that the retroactive application of *Batson* causes unique evidentiary problems for reviewing courts, as the three-step *Batson* inquiry with which we are all now familiar did not occur during *voir dire* in these cases. Thus, we are aware of the difficulties faced by both the Pennsylvania Supreme Court and the District Court in reviewing the record in this case.

Nevertheless, we cannot conclude, even under the deferential standard of review contained in AEDPA, that the Pennsylvania Supreme Court's resolution of Hardcastle's claim amounted to an objectively reasonable application of *Batson*. Specifically, even accepting the Pennsylvania Supreme Court's proffered justifications for the challenged strikes at face value, the court still (1) failed to identify adequate bases for the striking of Venirepersons 11 and 12, and

thus should have terminated its analysis and found the existence of a *Batson* violation at step two of the inquiry; and (2) failed to conduct a full and complete step three analysis with respect to the challenged strikes of Venirepersons 1-10.

However, exercising plenary review over the final judgment of the District Court, we similarly reject its decision to grant habeas corpus relief on the basis of the current evidentiary record. Instead, based on the facts of this case, in which the Commonwealth offered to state the bases for its strikes immediately following *voir dire* and in which both sides have, at various times, sought a hearing, we conclude that the District Court erred in granting habeas corpus relief without first providing the Commonwealth with the opportunity to present evidence in defense of the challenged peremptory strikes. The Commonwealth's prior observations of the difficulties it will have in recalling the reasons for its peremptory strikes should not now preclude it from making that effort when it has requested the opportunity to do so. Remand is therefore appropriate.

A. Background

The Supreme Court's decision in *Batson* has been interpreted as establishing a three-step inquiry for determining the constitutionality of challenged peremptory strikes. *See Riley*, 277 F.3d at 275.[3] First, "'a defendant may

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[3] As a preliminary matter, we note that, although § 2254 permits habeas corpus relief only in situations in which a state court's decision "is contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," our analysis of Supreme Court precedent may be amplified by decisions of inferior federal courts

(Continued)

establish a *prima facie* case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Id.* (quoting *Batson*, 476 U.S. at 96). "Once the defendant makes a *prima facie* showing of racial discrimination (step one), the prosecution must articulate a race-neutral explanation for its use of peremptory challenges (step two). If it does so, the trial court must determine whether the defendant has established purposeful discrimination (step three)." *Id.* Throughout this process, "[t]he ultimate burden of persuasion regarding racial motivation rests with, and does not shift from, the defendant." *Id.* Significantly, "[d]eference in a *Batson* case must be viewed in the context of the requirement that the state courts engage in the three-step *Batson* inquiry" described above. *Id.* at 286.

In reviewing this matter, we begin by noting the incomplete nature of the Pennsylvania Supreme Court's analysis of Hardcastle's *Batson* claim on direct appeal. Simply stated, the court conflated steps one and two of the *Batson* analysis in the sense that it identified and then analyzed potential justifications for the challenged strikes — something that should not occur until step two — in its step one analysis of whether Hardcastle had successfully established a *prima facie* case. The court then proceeded to step three, only to conclude that Hardcastle had failed to establish a *prima facie* case of discrimination, thus indicating that, technically speaking, its analysis never proceeded beyond step one.

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evaluating reasonableness under that Supreme Court precedent. *See Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 890 (3d Cir. 1999) (*en banc*).

The Pennsylvania Supreme Court apparently recognized this error when, in its subsequent decision regarding Hardcastle's appeal of the PCRA court's decision, it acknowledged as follows:

> Notwithstanding the language in our opinion [on direct appeal] to the effect that [Hardcastle] had not made out a prima facie case, the extensive analysis of the record for race-neutral reasons indicates that our post hoc analysis actually presumed the existence of a prima facie case, evaluated the evidence and all the relevant circumstances as the trial court would ordinarily do pursuant to Batson, and resolved the ultimate issue by deciding that the Commonwealth had not used its peremptory challenges improperly.

Hardcastle II, 701 A.2d at 548. In view of this ruling, we will follow the lead of the District Court in examining the Pennsylvania Supreme Court's decision on direct review, *see Hardcastle I*, as modified by its opinion on collateral review, *see Hardcastle II*. Stated alternatively, we will treat *Hardcastle I* as representing the Pennsylvania Supreme Court's full three-step analysis of Hardcastle's *Batson* claim.

We further note that we will read the Pennsylvania Supreme Court's acknowledgment in *Hardcastle II* of the existence of a *prima facie* case in *Hardcastle I* as a concession that Hardcastle had satisfied his burden at step one. In view of the fact that twelve of the prosecutor's peremptory strikes were exercised against African-American members of the venire, we have no doubt that this concession was appropriate. *See Rico v. Leftridge-Byrd*, 340 F.3d 178, 185 (3d Cir. 2003) (noting that "[o]ne way to establish a *prima facie*

case at step one is to show a pattern of peremptory challenges of jurors of a particular race") (citing *Batson*, 476 U.S. at 96-97). Even in the absence of such a concession, however, the Pennsylvania Supreme Court's decision to proceed to steps two and three moots the issue of whether Hardcastle made a sufficient showing at step one. *See Hernandez v. New York*, 500 U.S. 352, 359 (1991) (holding that "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot."). Thus, we will focus our discussion on steps two and three.

B. Step Two

As detailed in the District Court's opinion and summarized above, the Pennsylvania Supreme Court, in considering Hardcastle's direct appeal, examined the record in an effort to identify race-neutral bases for the twelve challenged strikes. It articulated what it considered to be specific and facially credible bases for the striking of Venirepersons 1 through 10. However, it was unable to do so with respect to Venirepersons 11 and 12 and therefore offered only the following general justifications for these strikes: (1) "the Commonwealth had the opportunity to observe the witnesses and their response to questioning prior to exercising the peremptory challenge"; and (2) "although the Commonwealth had ample challenges remaining, there were no challenges offered to two black jurors, one of whom ironically was challenged by the defendant." *Hardcastle I*, 546 A.2d at 1105.[4]

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[4] We note the existence of some uncertainty in the case law

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In addressing the question whether the justifications

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with respect to *who* may properly articulate the Commonwealth's justifications at this stage of the analysis. Here, this uncertainty raises the question whether, and to what extent, we may consider the race-neutral explanations offered by the Pennsylvania Supreme Court on behalf of the prosecutor. Some cases may be read to imply that, because the prosecutor's subjective intent is the principal focus of a *Batson* challenge, he or she must personally articulate the race-neutral basis required at step two. *See, e. g., Riley*, 277 F.3d at 282 (holding that "[t]he inquiry required by *Batson* must be focused on the distinctions actually offered by the State in the state court, not on all possible distinctions we can hypothesize. Apparent or potential reasons do not shed any light on the prosecutor's intent or state of mind when making the peremptory challenge") (citations omitted). We have previously determined, however, that "[w]e are unprepared to hold . . . that the state's burden can never be carried without direct evidence from the decisionmaking prosecutor regarding his or her state of mind." *See Johnson v. Love*, 40 F.3d 658, 667 (3d Cir. 1994); *Pemberthy v. Beyer*, 19 F.3d 857, 864-65 (3d Cir. 1994) (concluding that state appellate court properly made factual findings regarding *Batson* inquiry despite the fact that there was no state court hearing, and that the prosecutor, at that time, had not advanced anything more than a general explanation for the challenged strikes); *Jones v. Ryan*, 987 F.2d 960, 965-66 & n.2 (3d Cir. 1993) (suggesting that state appellate courts may make factual findings in their review of *Batson* claims); *Esquivel v. McCotter*, 791 F.2d 350, 351 (5th Cir. 1986) (affirming state appellate court's factual determination regarding *Batson* claim raised for first time on appeal).

However, even assuming *arguendo* that it was appropriate in this case for the Pennsylvania Supreme Court to sift through the trial record in an effort to identify unstated race-neutral bases for challenged peremptory strikes, the court failed to either (1)

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identified by the Pennsylvania Supreme Court for the striking of Venirepersons 11 and 12 are sufficient to satisfy the Commonwealth's burden of production, we note that the Supreme Court has purposely set a relatively low bar at step two. It therefore is rare for a case to be decided at this stage of the analysis. Indeed, "[t]he second step of [the *Batson* analysis] does not demand an explanation that is persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (*per curiam*). Rather, the sole issue at step two "is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 768.

Further, the Supreme Court has emphasized the necessity of maintaining the analytical distinction between steps two and three, as step two merely places upon the prosecutor the burden of producing an explanation; "[i]t is not until the *third* step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Id.* At step three,

> implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a

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identify a satisfactory step two explanation for the striking of Venirepersons 11 and 12, or (2) conduct an adequate step three analysis as to any of the African-Americans struck from the venire. Thus, even accepting the Pennsylvania Supreme Court's proffered justifications as facially valid, we are still unable to conclude that its resolution of the matter is an objectively reasonable application of *Batson*.

> trial judge *may choose to disbelieve* a silly or superstitious reason at step three is quite different from saying that a trial judge *must terminate* the inquiry at step two when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

The reasons presented at step two, however, must be "reasons," not merely a denial of discriminatory motive or an affirmation of good faith. *See Id.* at 768-69. "What [*Batson*] means by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Id.*

Under this standard, we need not conduct at step two an analysis of the purportedly race-neutral explanations proffered by the Pennsylvania Supreme Court with respect to Venirepersons 1 through 10. However, the justifications for the striking of Venirepersons 11 and 12 fail to satisfy even the minimal burden of production required at step two. The Pennsylvania Supreme Court's assertion that the striking of Venirepersons 11 and 12 was race-neutral simply because the prosecutor had an opportunity to observe them during *voir dire* is inadequate on its face. Indeed, "[t]he record contains no evidence whatsoever about any juror's demeanor or the prosecutor's observations or impressions thereof." *Hardcastle III*, 2001 WL 722781 at *13. Thus, this explanation amounts to nothing more than a statement that the prosecutor acted on intuition and with the absence of discriminatory intent. We have repeatedly rejected such vague and general claims in the past. *See United States v. Casper*, 956 F.2d 416, 418 (3d Cir. 1992) (holding that, because "[t]he *Batson* Court stated that explanations must be 'clear and reasonably

specific,'" "[e]xplanations based on a prosecutor's mere 'good faith' or 'intuition' do not suffice.") (citations omitted); *United States v. Clemons*, 843 F.2d 741, 745 (3d Cir. 1988) (noting that, "[a]lthough the reason need not approach the level justifying a challenge for cause, the [*Batson*] Court emphasized that the prosecutor must assert a clear, specific reason beyond 'his intuitive judgment' or 'his good faith.'") (quoting *Batson*, 476 U.S. at 98 & n.20).

We reject them again here. Indeed, to say, as the Pennsylvania Supreme Court did, that a prosecutor's step two burden may be satisfied based solely upon her opportunity to observe the jurors during *voir dire* creates an exception which threatens to swallow the rule. As Hardcastle correctly argues, the same could be said regarding almost any peremptory strike, and the acceptance of the explanation proffered by the Pennsylvania Supreme Court for the striking of Venirepersons 11 and 12 would render step two meaningless, as any prosecutor could bypass it by briefly questioning and observing the prospective juror prior to exercising the strike.

Second, the fact that the prosecutor had enough peremptory strikes to remove the two remaining African-American venirepersons, but chose not to do so, cannot demonstrate the absence of discriminatory intent in the striking of the other twelve African-Americans from the venire. *See Jones v. Ryan*, 987 F.2d 960, 972-73 (3d Cir. 1993) (rejecting a similar argument and noting that "[w]e doubt the significance of including a single black on the panel if, at the same time, the government used most of its peremptory challenges to strike blacks with backgrounds similar to the white jurors ultimately selected.") (quoting *Clemons*, 843 F.2d at 747); *see also Clemons*, 843 F.2d at 747 (holding that the striking of "a single black juror could constitute a prima facie case even when blacks ultimately sit on the panel and even when

valid reasons exist for striking other blacks."). Thus, absent further justification for the striking of Venirepersons 11 and 12, we cannot conclude that the Pennsylvania Supreme Court's decision to proceed to step three in justifying the strikes of Venirepersons 11 and 12 was an objectively reasonable application of *Batson*.

C. Step Three

We further hold that the failure of the Pennsylvania Supreme Court to conduct an adequate analysis at step three with respect to the challenged strikes of Venirepersons 1-10 also precludes a finding that its application of *Batson* was objectively reasonable. Step three requires a court conducting a *Batson* inquiry to "address[] and evaluate[] all evidence introduced by each side (including all evidence introduced in the first and second steps) that tends to show that race was or was not the real reason and determine[] whether the defendant has met his burden of persuasion." *Riley*, 277 F.3d at 286 (citation and internal quotations omitted). In *Riley*, we placed particular emphasis on the state courts' failure to consider all of the evidence before them in determining whether the justifications offered by the prosecutor were pretextual:

> The state courts in this case rejected Riley's *Batson* claim without discussing any of the ample evidence that throws into question the explanations offered by the prosecutor for striking two of the black jurors and there is nothing relevant in the record that might otherwise support the state courts' decisions. Thus, we do not know why the state courts found the State's explanation was plausible and credible in light of the other evidence. *It*

> *is because of the state courts' omission of a requirement under the third step of the* ***Batson*** *inquiry – of an ultimate determination on the issue of discriminatory intent based on* ***all*** *the facts and circumstances – that the State's argument founders.*

Id. at 287 (italicized emphasis added).

After close analysis of the record, we reach the same conclusion here. In so doing, we note that "a judge considering a *Batson* challenge is not required to comment explicitly on every piece of evidence in the record." *Id.* at 290. However, "some engagement with the evidence considered is necessary as part of step three of the *Batson* inquiry," and this requires "something more than a terse, abrupt comment that the prosecutor has satisfied *Batson*." Id. at 290-91 (citations and internal quotations omitted).

Here, "[t]he Pennsylvania Supreme Court's decision does not indicate that the court engaged in any analysis or consideration of the credibility of the potential justifications that it had proffered. Rather, the court's decision reads as if the court accepted the justifications at face value." *Hardcastle III*, 2001 WL 722781 at *12. Accordingly, as in both Jones and Riley, we lack an adequate step three analysis to which we may defer. The Commonwealth should be given the opportunity it requests to demonstrate that its exercise of peremptory strikes was justified under the *Batson* third step. In addition, Hardcastle should be afforded the opportunity to show any weaknesses he may find with the justifications for the strikes.

D. Remedy

Thus, in view of the state of the evidentiary record, we reject Hardcastle's argument in favor of affirmance.[5] Although we agree with the District Court's statement that it will be difficult at this late date to reconstruct the bases for the challenged strikes, we cannot agree with its conclusion that, under the facts of this case, the Commonwealth is not entitled to attempt to do so or that the state of the evidentiary record will not be improved as a result thereof. In so holding, we are persuaded by the fact that, despite the prosecutor's offer to state the bases for her peremptory strikes on the record immediately following *voir dire* and her subsequent request for some form of hearing, the Commonwealth has never been provided with either a state or federal forum in which to present evidence in defense of its actions in this case.

We further note that neither the prosecutor's concession during oral argument before the *en banc* Court of Common Pleas that she could not recall the precise bases for the challenged strikes nor the passage of time mandates a contrary result. As we have previously held:

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[5] We note that the District Court's conclusion that Hardcastle is entitled to a new trial was cited with approval by this Court in *Riley*, 277 F.3d at 294 & n.14 (citing *Hardcastle III*, 2001 WL 722781 at *19). Indeed, at oral argument before us, counsel for Hardcastle cited the Riley Court's approving reference to the granting of a new trial in *Hardcastle III* as reason to affirm the grant of his writ rather than to remand for a *Batson* hearing. However, it goes without saying that the merits of this case were not before us in *Riley*. Having now had the benefit of the parties' arguments with respect to this issue, we conclude that the District Court should not have granted relief without first holding an evidentiary hearing.

> [t]here will undoubtedly be post-conviction relief proceedings in which the state, by reason of death, absence, or faded memory, will be unable to produce a prosecutor with a specific recollection of the reason for a challenge alleged to violate *Batson*. Courts frequently are required to draw inferences from circumstantial evidence regarding a decision-maker's state of mind, however, and we are unwilling to rule out the possibility that the state may be able to satisfy its step two *Batson* burden by tendering circumstantial evidence.

Johnson, 40 F.3d at 667. Indeed, we have expressly rejected the notion that our prior precedent mandates relief in situations in which the prosecutor concedes that he or she cannot remember the bases for a challenged strike:

> [*Harrison v. Ryan*, 909 F.2d 84 (3d Cir. 1990),] is distinguishable . . . because the prosecutor in that case offered no explanation for excluding one of the six black venirepersons he had struck from the jury, but simply asserted at a hearing before a federal magistrate that he could not recall his reasons. It was based on the prosecutor's assertion that he did not know the reason he struck a black venireperson, coupled with the absence of any other explanation, that this court affirmed the order for a new trial. ***We do not read Harrison to suggest that a state cannot be permitted to reconstruct the prosecutor's rationale for excluding a juror during a later Batson***

hearing when the prosecutor admits to having no recollection of his motivations at the time.

Johnson, 40 F.3d at 667 n. 4 (emphasis added). Our conclusion that such difficulties in reconstructing *voir dire* do not foreclose an evidentiary hearing is further supported by the Supreme Court's resolution of similar situations. *See Miller-El v. Cockrell*, — U.S. —, 123 S. Ct. 1029, 1042-43 (2003) (noting that evidence presented at a *Batson* hearing two years after *voir dire* "was subject to the usual risks of imprecision and distortion from the passage of time," but nevertheless concluding that the Court of Appeals erred in refusing to grant a certificate of appealability); *Batson*, 476 U.S. at 133 n. 12 (remanding for a hearing despite the petitioner's concession that it would be all but impossible to reconstruct the prosecutor's rationale for the challenged strikes) (Burger, C. J., dissenting).

Thus, while the retroactive application of the Supreme Court's ruling in *Batson* undeniably causes many problems, we do not believe the weight of this burden should be borne solely by the Commonwealth. It is difficult in the context of a pre-*Batson* trial to fault Hardcastle's counsel for failing to request an evidentiary hearing following *voir dire*. It is equally unfair to require the Commonwealth to retry Hardcastle without first being provided with the opportunity to defend its conduct in the prior trial. Given the *Batson* Court's emphasis on the subjective intent of the prosecutor, we find it difficult to imagine a situation in which it would be appropriate to take the extraordinary step of granting habeas corpus relief without first providing the state with a hearing at which it could offer evidence in support of the challenged strikes if, as in this case, it desires to do so.

Finally, having concluded that further proceedings are required, we must address the parties' arguments as to the appropriate forum. Although both sides request a hearing as an alternative remedy, Hardcastle seeks to have the matter handled by the District Court while the Commonwealth asserts that the state courts must be given the first opportunity to rule on the new evidence submitted.

As we have previously held, "[w]e do not have authority under the federal habeas statutes, 28 U.S.C. § 2241 or § 2254, to remand a habeas corpus petition to a state court for an evidentiary hearing." *Keller v. Petsock*, 853 F.2d 1122, 1129 (3d Cir. 1988). Federal district courts, by contrast, may conduct such hearings. *See id.*[6] Moreover, even if we were able to remand directly to the state court, neither this Court nor the Supreme Court has held "that the state courts should, after having foregone the opportunity to hold an evidentiary hearing and resolve the issue, be given another opportunity to do so." *Id.* Therefore, to the extent that the Commonwealth asserts in its post-argument submission that we should grant the writ conditioned upon a hearing in state court, we reject this argument for the same reasons we declined to do so in Keller: "Such a remedy would . . . contravene the policy underlying the exhaustion requirement. State courts are certainly entitled to have the first opportunity

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[6] We note that AEDPA "amended the federal habeas statute in such a way as to limit the availability of new evidentiary hearings on habeas review." *Campbell v. Vaughn*, 209 F.3d 280, 286 (3d Cir. 2000) (citing 28 U.S.C. § 2254(e)(2)). However, even post-AEDPA, evidentiary hearings are permitted where, as here, the "state courts fail[] to resolve the factual issue on which [the petitioner's] habeas petition rests." *Id.* In such cases "the failure to develop the factual record would not be [the petitioner's] fault." *Id.* at 286-87.

to review federal constitutional challenges to state convictions. There is no requirement, however, that they be given more than one opportunity to adjudicate these claims." *Id.* at 1130 (citation omitted). Here, as in *Keller*, Hardcastle "has given the state courts their first opportunity, and they did not seize it. Therefore the federal district court must become the trier of fact." *Id.* (footnote omitted). Thus, we will remand this matter to the District Court for further development of the evidentiary record with respect to Hardcastle's *Batson* claim, and, if this claim ultimately fails, for consideration of the remaining issues presented in his habeas petition.

V. Conclusion

For the foregoing reasons, we will vacate the final judgment of the District Court and remand the matter for further proceedings consistent with this opinion.

Nygaard, J., dissenting.

I agree with most of the analysis and conclusions reached by the majority in its well-crafted and thorough opinion. I disagree, however, with the remedy. The Commonwealth (Appellant) argued before us that "the Pennsylvania court should be allowed to conduct a *Batson* hearing **if any is deemed necessary**." (emphasis added). I conclude that a hearing is not only unnecessary, but is unwarranted.

In its opinion, the District Court concluded that:

> The proper relief in this case is a new trial with the opportunity to retry the petitioner before a properly selected jury. A new trial is

> especially appropriate where, as here, the passage of time makes a new evidentiary hearing on the petition impossible. Nearly twenty years have passed since Petitioner's trial, such a length of time that even Respondents [the Commonwealth] admit[s] that an evidentiary hearing on Petitioner's *Batson* claim is unlikely to be helpful.[7]

I find that the District Court's reasons and reasoning are compelling and supported by the record. Hence, and essentially for the reasons given by the District Court, I respectfully dissent.

The Appellant argues that we should remand for a *Batson* hearing. I believe, however, that the Appellant is judicially estopped from presenting its "actual reasons," given the district attorney's admission during the direct appeal that she could not remember her reasons, nor could she reconstruct the record. Our opinion in *Johnson v. Love*, 40 F.3d 658 (3d Cir. 1994), raises an interesting option for

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[7] Also shortly after the trial and conviction, and on appeal to the three-judge Common Pleas panel, the prosecutor explained that she was unable to recall why she struck the African-American juror:

> How can I possibly now tell you why I challenged anybody? I don't think that now, some six months after, I can tell you why I challenged somebody then. I don't know how we can possibly have a hearing as to why I challenged a particular juror six months later.

Similarly, the prosecutor argued that it was impossible for her to reconstruct the record at that stage.

remand in certain cases for a hearing, allowing the state to attempt to meet its burden through circumstantial evidence of the prosecutor's intent. I do not think that works well here. We have the entire record before us, and it is clear that the prosecutor discriminated by striking African-Americans. The record is devoid of her intent. Moreover, although the Appellant provides many reasons why any particular juror might have been struck, it has not proffered any evidence of why they were or anything that would indicate a hearing on circumstantial evidence of actual reasons or intent would be productive.

I would affirm the District Court's decision to issue the writ and grant Petitioner Hardcastle a new trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONALD HARDCASTLE, Petitioner	:	CIVIL ACTION
v.	:	**CAPITAL CASE**
MARTIN HORN, et al., Respondents	:	NO. 98-CV-3028

Filed: June 27, 2001
Amended: July 2, 2001

MEMORANDUM

Padova, J.

Before the Court is Donald Hardcastle's Amended Petition for Habeas Corpus pursuant to 28 U.S.C. § 2254 seeking relief on the grounds that his conviction and sentence were obtained in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Hardcastle filed a Petition for Writ of Habeas Corpus on December 30, 1998, containing fifteen claims attacking every stage of his state court proceedings.[1] Following extensive

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[1] The various claims in the Petition are as follows. Claim One alleges that trial counsel provided ineffective assistance during the penalty phase by failing to investigate or present evidence of Petitioner's childhood abuse and mental health defects. Claim Two challenges the sufficiency of the evidence for conviction. Claim Three alleges that his trial counsel provided

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briefing on the issue of exhaustion, Petitioner filed an Amended Petition on November 29, 1999, reasserting most

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ineffective assistance by failing to adequately investigate the layout of the crime area. Claim Four alleges that the Pennsylvania Supreme Court failed to conduct an independent review of the record when adjudicating his direct appeal.

Claims Five and Six, under the rubric of ineffective assistance of counsel, contest the constitutionality of the sentencing jury's instructions regarding unanimity in finding mitigating circumstances, and the evidence of an aggravating circumstance for imposition of the death penalty, respectively. Claim Seven argues that the prosecutor improperly exercised peremptory challenges on the basis of race during jury selection. Claim Eight asserts that Petitioner's death sentence was a product of racial discrimination and was thus imposed in violation of both the Constitution and international law and treaty. Claim Nine alleges ineffective assistance of trial counsel in eliciting testimony about Petitioner's history of juvenile arrests during the penalty phase.

Claim Ten challenges the appellate process by arguing that the Pennsylvania Supreme Court's proportionality review was arbitrary and utilized flawed data. Claim Eleven asserts that the prosecutor impermissibly commented on Petitioner's failure to testify at trial during her closing argument in the guilt phase. Claim Twelve alleges a claim of ineffective assistance of trial counsel for failing to ask for a penalty phase jury instruction regarding unavailability of parole upon a sentence of life imprisonment. Claims Thirteen and Fourteen assert ineffective assistance of counsel because trial counsel failed to life qualify the jury and failed to object to the prosecutor's improper vouching for the imposition of the death penalty, respectively. Claim Fifteen asserts that Petitioner's jury was improperly death-qualified.

of the claims in the original Petition.[2] Oral argument on the Amended Petition was held on February 20 and 21, 2001. For the reasons that follow, the Court concludes that Petitioner is entitled to a writ of habeas corpus based on Claim Seven of the Amended Petition, alleging racially discriminatory exercise of peremptory challenges by the prosecutor during jury selection.[3] The Pennsylvania Supreme Court's adjudication of this claim resulted in decisions that were contrary to and an unreasonable application of clearly established federal law as determined by the United States Supreme Court, and were based on unreasonable determinations of the facts in light of the evidence available in the state court proceedings. Furthermore, the Court concludes that Petitioner has successfully established intentional discrimination by the prosecutor in selecting a jury in his case based on the state court record.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In the early morning of May 23, 1982, Joseph Gregg and Ernestine Dennis each were stabbed multiple times at Gregg's home at 2122 West Stewart Street in Philadelphia. The house was then set on fire. On May 25, 1982, Petitioner was arrested and charged with two counts of first degree murder, and one count each of arson endangering persons, arson endangering property, and burglary. On December 8, 1982, a jury convicted Petitioner on all counts. Following a

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[2] Petitioner withdrew Claim Eight for lack of exhaustion.

[3] Having resolved the Amended Petition on this ground, the Court declines to consider or address Petitioner's other claims and arguments. The remainder of this memorandum is limited to discussion of Claim Seven.

penalty hearing, the jury returned death sentences against Petitioner on both of the first degree murder counts on December 10, 1982.

During voir dire, the prosecutor exercised peremptory challenges against twelve African-American prospective jurors. Commw. Pet. to Vacate & Recons. Dec. 1, 1983, Order Granting Def.'s Mot. for New Trial ¶ 5(d); N.T. 4/27/83 at 24. At the conclusion of voir dire, Petitioner filed a motion for a mistrial arguing that he was denied due process under the state and federal constitutions because the prosecutor exercised the twelve challenges on the basis of race. N.T. 11/29/82 at 5-6; Def.'s Mot. for Mistrial. The trial court denied Petitioner's motion on the ground that neither state nor federal law placed any limitations on the prosecutor's use of peremptory challenges in the absence of proof of systemic racial discrimination. N.T. 11/29/82 at 8-9.

Following his conviction and sentencing, Petitioner filed a motion for a new trial that again raised the issue of the prosecutor's discriminatory exercise of peremptory challenges.[4] Def.'s Mot. for New Trial ¶ 6. The trial court denied the motion. On December 1, 1983, however, a three-judge panel of the Court of Common Pleas reversed the trial court and granted Petitioner's motion for a new trial. The panel concluded that proof of the exclusion of jurors through peremptory challenges on the basis of race in a single case could establish a constitutional violation and determined that such a violation occurred in Petitioner's case. *Commonwealth v. Hardcastle*, No. 3288-3293, June Term,

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[4] In his motion, Petitioner urged adoption of a burden-shifting test for intentional discrimination similar to that eventually established in *Batson v. Kentucky*, 476 U.S. 79 (1986). *See* Def.'s Brief in Support of Post Trial Mot. at 3-5.

1982, at 5 (Court of Common Pleas (en banc) Dec. 1, 1983). The Pennsylvania Superior Court reversed this grant of a new trial on March 8, 1985. Petitioner initially was permitted to appeal to the Pennsylvania Supreme Court, but his appeal was subsequently dismissed as improvidently granted. Instead, his case was remanded to the Court of Common Pleas for sentencing. On February 18, 1986, Petitioner was formally sentenced to death for each of the murder convictions and a term of years for the related convictions. N.T. 2/18/86 at 29-34.

Petitioner appealed to the Pennsylvania Supreme Court which affirmed his convictions and sentence on August 10, 1988. In his direct appeal, Petitioner reasserted his challenge to the prosecution's use of peremptory challenges in his case, citing *Batson v. Kentucky*, 476 U.S. 79 (1986). Resp't Ex. A at 10-24; Resp't Ex. B at 5-10. The Pennsylvania Supreme Court addressed and rejected Petitioner's challenge to the prosecutor's exercise of peremptory challenges on the merits under the *Batson* standard. *Commonwealth v. Hardcastle*, 546 A.2d 1101, 1103-5 (Pa. 1988). The United States Supreme Court denied Hardcastle's petition for a writ of certiorari on February 20, 1990. *Hardcastle v. Pennsylvania*, 493 U.S. 1093 (1990).

On September 13, 1990, Petitioner filed a motion for post-conviction relief pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541, that again raised a *Batson* claim. The Court of Common Pleas denied the PCRA motion on January 18, 1995. The Pennsylvania Supreme Court subsequently affirmed the denial of the PCRA petition. *Commonwealth v. Hardcastle*, 701 A.2d 541, 548 (Pa. 1998).

II. EXHAUSTION AND PROCEDURAL DEFAULT

The instant Amended Petition was filed pursuant to 28 U.S.C. § 2254 which allows federal courts to grant habeas corpus relief to prisoners "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a) (West 2001). Under that section, a writ of habeas corpus may not be granted unless the applicant has exhausted all remedies available in state court. 28 U.S.C.A. § 2254(b)(1)(A) (West 2001). "The exhaustion requirement ensures that state courts have the first opportunity to review federal constitutional challenges to state convictions and preserves the role of state courts in protecting federally guaranteed rights." *Caswell v. Ryan*, 953 F.2d 853, 857 (3d Cir.), *cert. denied*, 504 U.S. 944 (1992).

To exhaust the available state court remedies, a petitioner must fairly present all the claims that he will make in his habeas corpus petition in front of the highest available state court, including courts sitting in discretionary appeal. *O'Sullivan v. Boerckel*, 526 U.S. 838, 847-48 (1999); *Henderson v. Frank*, 155 F.3d 159, 164 (3d Cir. 1998). To "fairly present" a claim, a petitioner must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted. *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999). A petitioner who has raised an issue on direct appeal, however, need not raise it again in state post-conviction proceedings. *Evans v. Court of Common Pleas, Delaware County, Pa.*, 959 F.2d 1227, 1230 (3d Cir. 1992). Nor must the state court discuss or base its decisions upon the presented claims for those claims to be considered exhausted. *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996). The

burden of establishing that a habeas claim was fairly presented falls upon the petitioner. *Lines v. Larkins*, 208 F.3d 153, 159 (3d Cir. 2000).

A habeas corpus petition containing both exhausted and unexhausted claims ordinarily must be dismissed so that the petitioner may present the unexhausted claims to the state courts. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A petition containing unexhausted claims, however, is not subject to dismissal when those claims are procedurally barred under state law. *Toulson v. Beyer*, 987 F.2d 984, 987 (3d Cir. 1993) (citations omitted). In the event that a petition contains both exhausted and procedurally defaulted claims, the habeas court may adjudicate the exhausted claims but may not address the defaulted claims on the merits unless the petitioner shows either (a) that there was cause for the procedural default and that it resulted in prejudice; (b) that the failure to entertain the claim would produce a miscarriage of justice; or (c) that the procedural rule was not independent and adequate. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Doctor*, 96 F.3d at 683 (citing *Harris v. Reed*, 489 U.S. 255, 260-61 (1989)).

Respondents assert that Claims One, Four, Five, Seven, Eleven, Twelve, and Fourteen either in whole or part were not exhausted before the state courts and are now procedurally defaulted. With respect to these claims, Petitioner raises several novel exhaustion theories, including implied exhaustion and exhaustion by operation of state law, and alternatively argues that exhaustion is excused because the Pennsylvania procedural bar is not independent and adequate. According to the parties, therefore, all of the claims in the Amended Petition are either defaulted or exhausted. Both parties admit that no avenue presently exists for Petitioner to raise any unexhausted claims before a Pennsylvania state

court. The instant Petition, therefore, is not a mixed petition that is subject to dismissal.

Petitioner bases Claim Seven on two different theories. First, Petitioner argues that the record of voir dire proceedings before the state court alone establishes that the prosecutor exercised her peremptory challenges in a racially discriminatory manner in violation of *Batson*. Alternatively, Petitioner contends that he is able to establish the racially discriminatory exercise of peremptory challenges under the evidentiary burden imposed by *Swain v. Alabama*, 380 U.S. 202, 203-4 (1965), by adducing evidence of the systemic exclusion of African-Americans from Philadelphia juries by both the individual prosecutor and the Philadelphia District Attorney's office generally. Respondents concede that a *Batson* claim that is based solely on the state court record of voir dire was fully exhausted before the state court, but argue that Petitioner's alternative claim is unexhausted since it relies on additional statistical and videotape evidence that was never presented to the state courts.

The Court need not resolve this issue since the Court determines that Petitioner is entitled to relief based on his argument under *Batson* that references only the state court record.[5] This claim clearly was exhausted before the state courts. Petitioner repeatedly raised the issue of the prosecutor's exercise of peremptory challenges in a racially discriminatory manner based solely on the conduct of his own trial before the state courts. Def.'s Mot. for Mistrial at 1; Def.'s Mot. for New Trial ¶ 6; Resp't Ex. A at 10-24; Resp't Ex. B at 5-10; Resp't Ex. C at 46-50. The Pennsylvania Supreme

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[5] As a result, the Court will not address Petitioner's theories on exhaustion and excuse of default because their resolution is unnecessary for the Court's discussion of the *Batson* claim.

Court addressed the issue on both direct appeal and post-conviction relief. *See Hardcastle*, 701 A.2d at 548; *Hardcastle*, 546 A.2d at 1103-1105. Accordingly, Claim Seven, insofar as it is based on the state court record, was exhausted and is now properly before the Court.

III. LEGAL STANDARD

Since the Amended Petition was filed after April 24, 1996, it is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, 110 Stat. 1214. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997). AEDPA made numerous changes to Title 28, Chapter 153 of the United States Code, 28 U.S.C. §§ 2241-2255, the chapter governing federal habeas petitions, in order to further the principles of comity, finality and federalism. *See Williams v. Taylor*, 529 U.S. 420, 436 (2000).

Section 2254(d)(1), as amended by AEDPA, provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in

> light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d)(1) (West 2001). A habeas claim under *Batson* involves mixed questions of law and fact. *Jones v. Ryan*, 987 F.2d 960, 965 (3d Cir. 1993). To apply the AEDPA standards to pure questions of law or mixed questions of law and fact, federal habeas courts must first determine whether the state court decision regarding each claim was "contrary to" clearly established Supreme Court precedent. *Werts v. Vaughn*, 228 F.3d 178, 197 (3d Cir. 2000). If relevant United States Supreme Court precedent requires an outcome contrary to that reached by the state court, then the court may grant habeas relief at this juncture. *Matteo v. Superintendent S.C.I. Albion*, 171 F.3d 877, 890 (3d Cir. 1999). Otherwise, the court must evaluate whether the state court decision was based on an "unreasonable application of" Supreme Court precedent. *Id.*

A state court decision may be 'contrary to' clearly established federal law as determined by the United States Supreme Court in two ways.[6] *See Williams v. Taylor*, 429 U.S. 362, 405 (2000). First, a state court decision is contrary

[6] Neither standard for the 'contrary to' prong requires that the applicable Supreme Court precedent be factually identical to the case arising on habeas review:

> Rather, the critical question is "whether a Supreme Court rule – by virtue of its factual similarity (though not necessarily identicality) or its distillation of general federal law precepts into a channeled mode of analysis specifically intended for application to variant factual situations – can fairly be said to require a particular

(Continued)

to Supreme Court precedent where the court applies a rule that contradicts the governing law set forth in United States Supreme Court cases. *Id.* Alternatively, a state court decision is contrary where the state court confronts facts that are materially indistinguishable from a relevant United States Supreme Court precedent and arrives at an opposite result. *Id.* at 406.

On the other hand, a state court decision that applies the correct legal rule from United States Supreme Court precedent to the facts of a petitioner's case is more appropriately considered under the "unreasonable application" clause. *Id.* A state court decision can involve an "unreasonable application" of Supreme Court precedent if the state court identifies the correct governing legal rule but unreasonably applies it to the facts of the particular state prisoner's case. *Id.* at 407. A state court determination also may be set aside under this standard if the court unreasonably refuses to extend the governing legal principle to a context in which the principle should control or unreasonably extends the principle to a new context where it should not apply. *Ramdass v. Angelone*, 530 U.S. 156, 166 (2000); *Williams*, 529 U.S. at 407. To grant a habeas corpus writ under the unreasonable application prong, the federal court must determine that the state court's application of clearly established federal law was objectively unreasonable. *Williams*, 529 U.S. at 409;

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result in a particular case.

Matteo, 171 F.3d at 888-89 (quoting *O'Brien v. Dubois*, 145 F.3d 16, 15 (1st Cir. 1998)). Although *Batson* did not apply its standard to a particular set of facts, it did outline a general principle of law specifically intended for application to variant factual standards. Accordingly, a *Batson* claim may still be analyzed under the 'contrary to' prong.

Werts, 228 F.3d at 197. A federal court cannot grant habeas corpus simply by concluding in its independent judgment that the state court applied clearly established federal law erroneously or incorrectly; mere disagreement with a state court's conclusions is insufficient to justify relief. *Williams*, 529 U.S. at 411; *Matteo*, 171 F.3d at 891. In determining whether the state court's application of the Supreme Court precedent is objectively reasonable, habeas courts may consider the decisions of inferior federal courts. *Matteo*, 171 F.3d at 890.

The habeas statute further creates heightened deference to state court factual determinations by imposing a presumption of correctness. 28 U.S.C.A. § 2254(e)(1) (West 2001). The presumption of correctness is rebuttable only through clear and convincing evidence. *Id.* Clear and convincing evidence is evidence that is "so clear, direct, weighty and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *United States Fire Ins. Co. v. Royal Ins. Co.*, 759 F.2d 306, 309 (3d Cir. 1985).

Furthermore, the district court may only grant relief on a habeas claim involving state court factual findings where the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.A. § 2254 (d)(2)(West 2001); *see Weaver v. Bowersox*, 241 F.3d 1024, 1030 (8th Cir. 2001); *Watson v. Artuz*, No. 99Civ.1364 (SAS), 1999 WL 1075973, at *3 (S.D. N.Y. Nov. 30, 1999) (listing cases). The district court must conclude that the state court's determination of the facts was objectively unreasonable in light of the evidence available to the state court. Weaver, 241 F.3d at 1030 (citing *Williams*, 529 U.S. at 409); *Torres v. Prunty*,

223 F.3d 1103, 1107-8 (9th Cir. 2000); *see also Watson*, 1999 WL 1075973, at *3. Mere disagreement with the state court's determination, or even erroneous factfinding, is insufficient to grant relief if the court acted reasonably. *Weaver*, 241 F.3d at 1030.

IV. DISCUSSION

Under AEDPA, a state court's legal determinations may only be tested against a rule of federal law that was clearly established at the time the state conviction became final. *See* 28 U.S.C.A. § 2254(d)(1) (West 2001); *Williams*, 529 U.S. at 380. Accordingly, the Court will first identify the appropriate Supreme Court precedent and determine whether it was clearly established at the time when Petitioner's conviction became final. The Court will then apply the AEDPA standards in § 2254(d) to Claim Seven. Because the Pennsylvania Supreme Court's decision was contrary to and involved unreasonable applications of *Batson* and was based on unreasonable determinations of the facts in light of the record, the Court will also determine whether Petitioner successfully establishes a *Batson* violation.

A. Clearly Established Federal Law

State court's determinations may only be tested against "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.A. § 2254(d)(1) (West 2001). This phrase refers to the "holdings, as opposed to the dicta" of the Supreme Court's decisions as of the time of the relevant state-court decision. *Williams*, 529 U.S. at 412. Courts look to principles outlined in *Teague v. Lane*, 489 U.S. 288 (1989), to determine whether a rule of law is clearly established for habeas purposes. *Williams*, 529 U.S. at 379-80, 412. "[W]hatever would qualify as an old

rule under [the Court's] *Teague* jurisprudence will constitute clearly established Federal law," except that the source of that clearly established law is restricted to the United States Supreme Court. *Id.* at 412. The federal habeas court must independently evaluate whether a rule was clearly established at the time the state court rendered the final judgment of conviction.[7] *Id.* at 382.

As early as 1965, the United States Supreme Court held as a broad proposition that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." *Swain v. Alabama*, 380 U.S. 202, 203-4 (1965). The general principle that prosecutors may not engage in intentional discrimination when selecting juries, therefore, was clearly established at the time of Petitioner's trial in 1982 and at the time of the subsequent state court decisions. The quantum of proof necessary to successfully prove purposeful discrimination in the context of jury selection, however, changed over the years. *Swain* applied a presumption that "in any particular case . . . the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court." *Id.* at 222. This presumption could not be overcome by showing that the prosecution exercised peremptory challenges against all or some prospective jurors of a particular race on the basis of their race in a single case. *Id.* Instead, *Swain* required proof of systemic use of peremptory challenges to remove jurors on the basis of race, such that "the State has not seen fit to leave a single Negro on any jury in a criminal case." *Id.* at 223-24. Accordingly, only proof of systemic exclusion of jurors of a

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[7] Respondents do not dispute that *Batson* constituted clearly established law at the time Petitioner's final judgment of conviction was rendered.

certain race over a period of time through peremptory challenges would overcome the presumption of fairness and create an inference of intentional discrimination. *Id.* at 227.

In 1986, the United States Supreme Court revisited the issue of the evidentiary burden borne by criminal defendants in proving purposeful discrimination by the State on the basis of race in jury selection. *Batson*, 476 U.S. at 90 (1986). The Supreme Court rejected *Swain*'s requirement of proof of systemic discriminatory use of peremptory challenges over a span of cases, and instead held that a defendant may make a prima facie showing of intentional discrimination in the selection of his or her jury by relying on the prosecutor's exercise of peremptory challenges at the defendant's own trial. *Id.* at 96. Thus, the United States Supreme Court's holding in *Batson* consisted of two parts. First, the Supreme Court reaffirmed the principle that the use of peremptory challenges on the basis of race violates the Equal Protection Clause of the United States Constitution. Most importantly, however, the Supreme Court established a different standard for courts to use in evaluating such claims.

Batson's standard for evaluating claims of racially discriminatory exercise of peremptory challenges was clearly established at the time of Petitioner's final judgment of conviction. The opinion in *Batson* was issued on April 30, 1986. On January 13, 1997, the Supreme Court provided for the retroactive application of *Batson* to all cases pending on direct appeal at the time *Batson* was decided. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The Pennsylvania Supreme Court handed down Petitioner's final judgment of conviction on August 10, 1988, over two years after *Batson* was decided and over one year after it had been made retroactive. *Hardcastle*, 546 A.2d at 1101, 1104; *see Nevius v. McDaniel*, 218 F.3d 940, 947 (9th Cir. 2000) (holding

conviction finalized following exhaustion of direct appeal before state supreme court). Because *Batson* was decided well before Petitioner's conviction became final, it was not a new rule under *Teague*. *See Wright v. West*, 505 U.S. 277, 291 (1992) ("*Teague* defined a "new" rule as one that was "not dictated by precedent existing at the time the defendant's conviction became final."). Accordingly, the *Batson* principle and standard were clearly established federal law at the time of Petitioner's final conviction.

B. Application of the AEDPA Standard to the Pennsylvania Supreme Court's Decision on Direct Appeal, As Revised by the PCRA Appeal Decision

The Government exercised peremptory challenges against the following jurors: Aileen Conway, juror no. 91; Lisa Stewart, juror no. 456; William Preston, juror no. 367; Adrienne Marsh, juror no. 293; Catherine Taylor, juror no. 483; Marian Johnson, juror no. 178; Shirley Davis, juror no. 81; Kim Richards, juror no. 322; Iris Garayua, juror no. 119; Gladys Workman, juror no. 461; Lorraine Fox, juror no. 128; James Richardson, juror no. 339; Mary Henry, juror no. 103; Janice Ferrell, juror no. 70; and Anthony Aiello, juror no. 2.[8] *See* N.T. 11/15/82 at 1.22, 1.30, 1.114, 1.116; N.T. 11/16/82 at 2.3, 2.8, 2.14, 2.22, 2.28; N.T. 11/17/82 at 8, 14, 46, 50, 92, 96, 121, 128; N.T. 11/18/82 at 4.40, 4.46, 4.57, 4.60, 4.65; N.T. 11/19/82 at 5.40, 5.44, 5.62, 5.64, 5.95, 5.99. In pressing his claim of racially discriminatory peremptory challenges before the state courts, Petitioner identified twelve of those challenged jurors as African-American: Lisa

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[8] The record reveals that the Government exercised fifteen peremptory challenges, not fourteen as the court stated. *See Hardcastle*, 546 A.2d at 1104.

Stewart; William Preston; Adrienne Marsh; Catherine Taylor;[9] Marian Johnson; Shirley Davis; Kim Richards; Gladys Workman; Lorraine Fox; James Richardson; Mary Henry; and Janice Ferrell. Def.'s Mot. for Mistrial ¶ 2; Def.'s Mot. for New Trial ¶6(b); *see also* Resp't Ex. A at 25 & Ex. C; Resp't Ex. B at 7; Resp't Ex. C at 46. The Pennsylvania Supreme Court presumed the accuracy of Petitioner's identification of the challenged African-American jurors since it made no contrary finding. Furthermore, the state court record reveals no instance where the Government contested the accuracy of Petitioner's identifications. *Compare* Commw. Pet. to Vacate and Recons. Dec. 1, 1983 Order, Granting Def.'s Mot. for New Trial and Granting Reargument Thereon ¶ 5(d).

The Pennsylvania Supreme Court addressed Petitioner's claim on both direct appeal and PCRA review. Acknowledging that the United States Supreme Court had held *Batson* retroactive to cases pending on direct appeal when the case was decided and finding that Petitioner had adequately preserved the issue, the court addressed Petitioner's challenge to the prosecutor's exercise of peremptory challenges on the merits under the *Batson* standard. *Hardcastle*, 546 A.2d at 1103-5.

Because trial counsel failed to object at the time of each peremptory challenge, the trial court provided no opportunity for the prosecutor to place her reasons for striking the African-American jurors on the record. *Id.* at 1104. Since

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[9] Petitioner identified Taylor as "Kathryn Taylor." (*See* Mot. for Mistrial.) The trial transcripts spell the name as "Catherine Taylor." (*See* N.T. 11/16/82 at 2.22.) There is only one juror with a surname of Taylor whom the Government peremptorily challenged during voir dire at Petitioner's trial.

the record lacked the prosecutor's reasons for her strikes, the Pennsylvania Supreme Court canvassed the voir dire transcript to determine whether any of the twelve jurors stricken by the prosecution had provided information that could conceivably constitute a race-neutral reason for striking that juror. *Id.* at 1104-5. The court first found that the voir dire transcript contained potential race-neutral reasons to justify the prosecutor's exercise of peremptory challenges with respect to ten of the excluded jurors. *Id.* The Pennsylvania Supreme Court discussed these ten jurors in the order of their challenge rather than by name or juror number. *See id.* at 1104-5. To facilitate review, this Court matched the Pennsylvania court's description of each challenged juror's voir dire testimony with the trial record.[10]

[10] The Pennsylvania Supreme Court discussed the first juror as follows: "The first challenged juror, when questioned by the Commonwealth, indicated that a member of his family had been the victim of violent crime. His sister had been raped approximately six or seven years prior to appellant's trial." *Hardcastle*, 546 A.2d at 1104. This description matches the testimony of William Preston, juror no. 467, who was the third juror of any race and the second African-American juror to be peremptorily challenged by the Commonwealth. *Id.*; N.T. 11/16/82 at 2.3-2.8; *see also* N.T. 11/15/82 at 1.22, 1.30, 1.114, 1.116. The court's description of the "second challenged juror" matches the testimony of Adrienne Marsh, juror no. 293, the third African-American challenged juror. *Hardcastle*, 546 A.2d at 1104; N.T. 11/16/82 at 2.8-2.14. The description of the "third challenged juror" matches the testimony of Catherine Taylor, juror no. 483, the fourth African-American challenged juror. *Hardcastle*, 546 A.2d at 1105; N.T. 11/16/82 at 2.22-2.28. The description of the "fourth challenged juror" matches the testimony of Marian Johnson, juror no. 178, the fifth African-American challenged juror. *Hardcastle*, 546 A.2d at 1105; N.T. 11/17/82 at 8-14. The court's description of the "sixth challenged juror" matches the testimony

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Outside of the ten jurors whose testimony was specifically described, the Pennsylvania Supreme Court determined that the remaining two African-American jurors whom the prosecutor excluded could have been challenged based on the Commonwealth's observations of their demeanor:

> In the other two instances, the Commonwealth had the opportunity to observe the witnesses and their response to questioning prior to exercising the peremptory challenge.

Hardcastle, 546 A.2d at 1105. The court again failed to identify the jurors by name or number. The only African-American jurors whose testimony did not match any of the ten specific descriptions supplied by the Pennsylvania Supreme Court, however, were Lisa Stewart, juror no. 456, and Kim Richards, juror no. 322. *See Hardcastle*, 546 A.2d at 1104-5; N.T. 11/15/82 at 1.114-1.116; N.T. 11/17/82 at 92-96.

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of Lorraine Fox, juror no. 128, the ninth challenged African-American juror. *Hardcastle*, 546 A.2d at 1105; N.T. 11/18/82 at 4.57-4.60. The description of the "seventh challenged juror" matches the testimony of James Richardson, juror no. 339, the tenth excluded African-American juror. *Hardcastle*, 546 A.2d at 1105; N.T. 11/18/82 at 4.60-4.65. The description of the "eighth challenged juror" matches the testimony of Mary Henry, juror no. 103, the eleventh excluded African-American juror. *Hardcastle*, 546 A.2d at 1105; N.T. 11/19/82 at 5.40- 5.44. The description given for the "ninth challenged juror" matches the testimony of Janice Ferrell, juror no. 70, the twelfth excluded African-American juror. *Hardcastle*, 546 A.2d at 1105; N.T. 11/19/82 at 5.62-5.64. The Court will discuss in detail the court's description of the fifth and tenth challenged jurors later in this memorandum.

After making these determinations, the court held that Petitioner failed to establish a prima facie case of purposeful discrimination under *Batson*:

> A review of this record indicates that an identifiable reasonable basis for a challenge was available in at least ten of the Commonwealth's twelve peremptory challenges. In the other two instances the Commonwealth had the opportunity to observe the witnesses and their response to questioning prior to exercising the peremptory challenge. In addition, although the Commonwealth had ample challenges remaining, there were no challenges offered to two black jurors, one of whom ironically was challenged by the defendant. On this record we find that appellant has not made out a prima facie case of the Commonwealth's improper use of peremptory challenges.

Hardcastle, 546 A.2d at 1105. On PCRA review, however, the Pennsylvania Supreme Court revised its earlier opinion made on direct review to presume the existence of a prima facie case:

> Notwithstanding the language in our opinion [on direct appeal] to the effect that the Appellant had not made out a prima facie case, the extensive analysis of the record for race-neutral reasons indicates that our post hoc analysis actually presumed the existence of a prima facie case, evaluated the evidence and all the relevant circumstances as the trial

> court would ordinarily do pursuant to *Batson*, and resolved the ultimate issue by deciding that the Commonwealth had not used its peremptory challenges improperly.

Hardcastle, 701 A.2d at 548. All of the discussion in this memorandum that follows refers to the Pennsylvania Supreme Court's direct appeal decision as revised by its PCRA decision.

Petitioner challenges the Pennsylvania Supreme Court's analysis of his claim as contrary to, and an unreasonable application of, *Batson* on several grounds. First, Petitioner contends that the court's post hoc reconstruction analysis used with respect to all twelve jurors is contrary to *Batson* because it provides no basis for determining the prosecutor's subjective intent. Second, Petitioner argues that the court's decision was contrary to *Batson* because the court failed to uncover any race-neutral reason for the prosecutor's challenge of two jurors and failed to remand for a new trial. Lastly, Petitioner challenges the reasonability of the state court's factual findings of no intentional discrimination with respect to several jurors.

1. The Pennsylvania Supreme Court's Contrary Application of *Batson*

The Pennsylvania Supreme Court's decision was contrary to *Batson* because the court confronted a situation that is factually indistinguishable from *Batson* but yet reached an opposite result. In *Batson*, the trial court rejected the defendant's timely objection without determining if the facts established a prima facie case of purposeful discrimination. *Batson*, 476 U.S. at 100. The Supreme Court remanded the case for such a determination. *Id.* The trial court in

Petitioner's case engaged in the same course of conduct, but the Pennsylvania Supreme Court failed to remand the case.

Batson further provides that if the facts establish a prima facie case and the prosecutor fails to come forward with a neutral explanation, the conviction must be reversed. *Id.* The Pennsylvania Supreme Court determined that Petitioner had established a prima facie case, but the prosecutor in Petitioner's case never advanced any neutral reasons for her challenges. *Hardcastle*, 701 A.2d at 548; *Hardcastle*, 546 A.2d at 1104. The only statements by the prosecutor in the record of her reasons for exercising the relevant challenges are general denials of racial bias or statements of her inability to remember the reasons for the challenges. N.T. 4/27/83 at 49 ("How can I possibly now tell you why I challenged anybody? I don't think that now, some six months after, I can tell you why I challenged somebody then."); N.T. 4/27/83 at 80 ("I'm not saying that the race of the venireman was the reason for those challenges."). Statements such as these were explicitly rejected by *Batson* as being insufficient to sustain the prosecutor's burden of production. *See Batson*, 476 U.S. at 98 ("Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.'") (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)). Since the *Batson* court held these reasons to be insufficient as a matter of law and no other valid neutral reasons proffered by the prosecutor appear in the record, *Batson* required reversal of Petitioner's conviction. The Pennsylvania Supreme Court failed to do so and thus reached a result directly contrary to *Batson*.

2. The Pennsylvania Supreme Court's Use of Potential Justifications for the Prosecutor's Exercise of Peremptory Challenges

Since the prosecutor in Petitioner's case was never required to offer any justification for her exercise of peremptory challenges, the Pennsylvania Supreme Court independently searched the voir dire transcript for race-neutral information on each challenged juror that could potentially have been raised to justify that juror's challenge. *See Hardcastle*, 546 A.2d at 1104. Thus the court implicitly determined as a matter of law that such apparent or potential justifications could substitute for the actual reasons that should have been proffered by the prosecutor. The Court concludes that the Pennsylvania Supreme Court's legal conclusion that judicially-inferred justifications for the prosecutor's challenges are sufficient to satisfy *Batson*'s requirement that the prosecutor advance a justification for the challenges is contrary to or, alternatively, an unreasonable application of *Batson*.

Longstanding United States Supreme Court precedent clearly states that a party asserting a violation of the Equal Protection Clause must prove that the opposing party acted with discriminatory intent or purpose. *See Batson*, 476 U.S. at 93; *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 239-40 (1976) (citing *Atkins v. Texas*, 325 U.S. 398, 403-4 (1945)). In accordance with this principle, *Batson* proscribes only intentional or purposeful discrimination in exercising peremptory challenges. *Batson*, 476 U.S. at 98. To enable this inquiry into intent and purpose, *Batson* places on the prosecutor the burden of producing a neutral explanation for the peremptory challenge, the credibility of

which the court then weighs. *Id.* at 97. Hence, *Batson* clearly focuses the court's inquiry on the prosecutor's state of mind, namely the presence or absence of an intent to discriminate on the basis of race. Here, the justifications for the prosecutor's challenges were proffered by the court, not the prosecutor. The method of analysis employed by the Pennsylvania Supreme Court is contrary to *Batson* because it exempts the prosecutor from satisfying the burden of production imposed by *Batson*. Thus, the state court, by sua sponte generating justifications for the prosecutor's challenges, applied a rule of law that is contrary to that established by *Batson*.

Even if the state court's method is not contrary to *Batson*, it at least constitutes an unreasonable application of *Batson* because the fact that certain information known about a juror could have supported a non-discriminatory challenge does not support any reasonable inference that the prosecutor actually relied on any of that information. *See United States v. Page*, No.97C2115, 1999 WL 652035, at *7 (N.D. Ill. Aug. 20, 1999). Because apparent reasons do not reflect the prosecutor's actual motivation, they "cannot be mistaken for the actual reasons for a [peremptory] challenge." *Mahaffrey v. Page*, 162 F.3d 481, 483-84 n.1 (7th Cir. 1999). Given *Batson*'s emphasis on the prosecutor's intent, reliance on apparent or potential reasons is objectively unreasonable because they do not shed any light on the prosecutor's intent or state of mind when making the challenge. *See Mahaffrey*, 162 F.3d at 484 n.1; *Johnson v. Love*, 40 F.3d 658, 667 (3d Cir. 1994) (requiring the state to produce evidence of the prosecutor's state of mind in addition to proffering justifications for the challenges when addressing *Batson* in a post-trial context).

As a corollary, the court's factual determination that the potential reasons generated with respect to ten of the African-American jurors successfully rebutted the inference of discrimination raised by Petitioner's prima facie case is unreasonable in light of the available record evidence. The court combed the record for facts about the jurors that could potentially support a race-neutral justification for the peremptory challenge of ten of the jurors, *see Hardcastle*, 546 A.2d at 1105, but identified no evidence in the record that purported to show the prosecutor's actual reasons for exercising the peremptory challenges. While the apparent reasons gleaned from the record could have been the prosecutor's operative reasons that she might have offered in response to a *Batson* objection, no reviewing court could reasonably say that they probably were the prosecutor's reasons without engaging in sheer and unsupported speculation. *Page*, 1999 WL 652035, at *8. It is objectively unreasonable to conclude that the inference of purposeful discrimination created by the prima facie case is rebutted in the absence of any actual reasons that reflected the prosecutor's subjective intent.

The only explanations in the record that arguably reflect the prosecutor's state of mind are statements that the prosecutor could not remember the reasons for the challenge and other general denials of any racial bias. N.T. 4/27/83 at 49; N.T. 4/27/83 at 80. *Batson* discredits such general denials of discrimination. *See Batson*, 476 U.S. at 98. As such, the prosecutor's statements are not neutral explanations under *Batson*, and any determination that the prima facie inference of discrimination was rebutted by these statements is objectively unreasonable.

Even if the Pennsylvania Supreme Court's use of the potential justifications it created from the record was proper, the court's opinion was still contrary to *Batson*. *Batson*

provides that once a justification for the peremptory challenge is offered, the court must determine if the defendant established intentional discrimination. *Id.* at 98. In making this ultimate determination, *Batson* anticipates that the court will weigh the credibility of the proffered reasons and the relevant circumstances that raised the inference of discrimination to reach its conclusion as to the existence of intentional discrimination. *Id.* at 93, 98 n.21 ("In deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'") (quoting *Arlington Heights*, 429 U.S. at 266). The Pennsylvania Supreme Court's decision does not indicate that the court engaged in any analysis or consideration of the credibility of the potential justifications that it had proffered. Rather, the court's decision reads as if the court accepted the justifications at face value. If the court failed to engage in substantive analysis of the potential reasons it found in the record, then the court's decision was contrary to *Batson*.

3. The Prosecutor's Opportunity to Observe the Demeanor of Two of the Challenged Jurors

After uncovering potential neutral reasons for ten of the strikes, the court found that the remaining two African-American jurors could have been excluded because:

> the Commonwealth had the opportunity to observe the witnesses and their response to questioning prior to exercising the peremptory challenge.

Hardcastle, 546 A.2d at 1105. The Court determines that the state court's conclusion that this explanation is sufficient to

satisfy *Batson* is an objectively unreasonable application of *Batson*.[11]

Batson requires that the prosecution's proffered race-neutral reason be both "clear and reasonably specific" and "related to the particular case to be tried." *Batson*, 476 U.S. at 98 (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981)). When assessing whether a prosecutor has properly advanced an explanation for a peremptory challenge based on demeanor, courts require that the prosecutor provide some detail about her concerns or impressions of the stricken juror's demeanor or attitude. *See, e.g.*, *Burks v. Borg*, 27 F.3d 1424, 1429-30 (9th Cir. 1994); *United States v. Johnson*, 4 F.3d 904, 913 (10th Cir. 1993); *Brown v. Kelly*, 973 F.2d 116, 120 (2d Cir. 1992); *United States v. Sherrills*, 929 F.2d 393, 394-95 (8th Cir. 1991); *United States v. Horsley*, 864 F.2d 1543, 1546 (11th Cir. 1989).

A blanket statement that the prosecutor had the opportunity to observe the jurors' demeanor is not reasonably specific or related to Petitioner's particular case. The court's explanation does not contain or reference any information about either the jurors' demeanor or the prosecutor's impressions thereof. Because it is phrased as "the opportunity to observe" the jurors' demeanor, the explanation is not even specifically connected to the particular prosecutor exercising the challenge, the particular case being tried, or the juror who was struck. The court's supposition regarding demeanor is indistinguishable from the general denials of a discriminatory

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[11] *Batson* neither prohibits peremptory challenges from being exercised on the basis of a juror's demeanor, nor discredits justifications based on demeanor as per se racially discriminatory. Accordingly, the state court's reliance on that justification cannot be contrary to *Batson*.

motive or affirmation of good faith that *Batson* squarely determined to be insufficient as a matter of law. *See Batson*, 476 U.S. at 97. Accordingly, the court's conclusion that having the 'opportunity' to observe the jurors' demeanor constituted a reasonably specific explanation that was related to the particular case that was being tried was objectively unreasonable. Since this is the only potential justification that the court found for striking two of the African-American jurors and the explanation is inadequate as a matter of law, *Batson* required the court to vacate Petitioner's conviction. *See Johnson*, 40 F.3d at 668 ("*Batson* inquiry ends and the conviction must be vacated at the second stage of the analysis if the state's explanation is such that, taken at face value, it . . . would otherwise be inadequate as a matter of law.")

In determining that no purposeful discrimination occurred, the state court found that the prosecutor's opportunity to observe the jurors' demeanor rebutted the inference of discrimination created by Petitioner's prima facie case. This factual determination also constitutes an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. The Pennsylvania Supreme Court was not present during the actual voir dire and thus relied solely on the record transcripts in reaching its conclusion. The record contains no evidence whatsoever about any juror's demeanor or the prosecutor's observations or impressions thereof. *See also Sherrills*, 929 F.2d at 395 (noting that observations of demeanor are generally not reflected in the written record). In the absence of any evidence relevant to demeanor, it is objectively unreasonable to derive any inference, positive or negative, about the challenged jurors' demeanor or the prosecutor's impressions of the jurors' attitude. To permit such blatant speculation to rebut the inference of purposeful discrimination created by defendant's prima facie case would transform the Equal Protection

Clause into "a vain and illusory requirement." *See Batson*, 476 U.S. at 97. Accordingly, the Pennsylvania Supreme Court's findings that a neutral explanation existed and that Petitioner's prima facie case was rebutted with respect to those jurors is based on an unreasonable determination of the facts.

4. The Pennsylvania Supreme Court's Factual Finding with Respect to the "Tenth Challenged Juror"

As previously explained, the Pennsylvania Supreme Court reviewed Petitioner's claim by canvassing the record to uncover potential race-neutral reasons for challenging the African-American jurors. *Hardcastle*, 546 A.2d at 1104. Based in part on a finding that race-neutral reasons existed in the record to justify the exclusion of ten of the African-American jurors, the court found as fact that Petitioner failed to ultimately establish purposeful discrimination. *Hardcastle*, 546 A.2d at 1105; *see Batson*, 476 U.S. at 98 n.21 (commenting that a finding of intentional discrimination is a finding of fact). To determine the reasonability of Pennsylvania Supreme Court's findings, this Court has reviewed the record of voir dire. Based on this review, the Court concludes that the court's finding of the existence of a race-neutral justification for challenging one of the African-American jurors was an objectively unreasonable determination of fact because it was based on the testimony of a juror who was not identified as African-American and whose exclusion Petitioner did not contest before the state court.

The last juror whose testimony was specifically described by the Pennsylvania Supreme Court does not match any of the jurors who Petitioner identified to the court

as being African-American and whose challenge Petitioner contested before the state courts. The court stated:

> The tenth challenged juror testified that he was a thirty-five year old single bartender living in south Philadelphia. When asked if there was a reason whether he could not return a verdict of death, even in a proper case, the juror stated "No . . ., I wouldn't go against my word, you know, whatever I thought was right." He then changed his testimony indicating that he would follow the law as defined by the judge.

Hardcastle, 546 A.2d at 1105. The only juror whose voir dire testimony matches this information is Anthony Aiello ("Aiello"), juror number 2. *See* N.T. 11/19/82 at 5.95-5.99. Although the record reveals that he was peremptorily challenged by the prosecution, the record is completely devoid of any evidence that Aiello was African-American. *See* N.T. 11/19/82 at 5.95-5.99. Aiello has never been identified by Petitioner or the Commonwealth as being African-American. *See* Def.'s Mot. for Mistrial ¶ 2; Def.'s Mot. for New Trial ¶ 6(b); *see also* Resp't Ex. A at 25, Ex. C. Petitioner has never challenged Aiello's exclusion. Furthermore, the Government never disputed Petitioner's identification of the African-American jurors. The Pennsylvania Supreme Court never determined that Petitioner's identifications were erroneous, and the record contains no basis for doing so. Since the state court specifically discussed the challenges of twelve jurors, the court obviously substituted Aiello for one of the African-American jurors and used his testimony to justify the peremptory challenge of that juror. In light of these circumstances, the court's substitution of Aiello was not merely erroneous, but also was objectively unreasonable because it

is completely unsupported by the record. *See Watson*, 1999 WL 1075973 at *3 (indicating that an unreasonable determination occurs where the finding is "'so devoid of record support' as to indicate that it is outside the universe of plausible, credible outcomes").

In replacing one of the African-American jurors whose exclusion Petitioner challenges with Aiello, a juror who has never been identified as African-American and whose exclusion Petitioner has never challenged, the court failed to specifically address the merits of the *Batson* claim with respect to one of the twelve African-American jurors.[12] Since the court found no facts to rebut the inference of intentional discrimination created by Petitioner's prima facie case with respect to that juror, the court's ultimate finding that Petitioner failed to prove intentional discrimination with respect to that omitted juror is objectively unreasonable. Such a result directly contradicts *Batson*'s requirement that the conviction be vacated where there is no justification proffered. *Batson*, 476 U.S. at 100.

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12 The Court notes that the Pennsylvania Supreme Court's description of the "fifth challenged juror" potentially matches the testimony of two African-American jurors whom Petitioner alleges were discriminatorily excluded, Gladys Workman or Shirley Davis. *See Hardcastle*, 546 A.2d at 1105; N.T. 11/17/82 at 49; N.T. 11/18/82 at 4.43-4.44. Respondents would likely argue that the Pennsylvania Supreme Court must have substituted Aiello for either Workman or Davis, and that the court's unreasonable determination of fact caused by Aiello's substitution is essentially rendered harmless because the court's finding of a neutral explanation would have applied to both of those jurors. The Court, however, will not speculate about what the Pennsylvania Supreme Court might have done had it attempted to correct its determinations. Such conjecture is exactly the type of improper review that the Court has rejected throughout this memorandum.

C. Plenary Review of Petitioner's *Batson* Claim

Having concluded that the Pennsylvania Supreme Court's decision was contrary to and an unreasonable application of clearly established federal law as determined by the United States Supreme Court in *Batson* and was based on unreasonable determinations of the facts in light of the record, the Court may grant habeas corpus relief pursuant to 28 U.S.C. § 2254(d). The question now becomes whether the Court should grant habeas relief based on the merits of Petitioner's *Batson* claim. The Court is obliged to conduct an independent de novo review of Petitioner's *Batson* claim to determine if issuance of a writ is warranted.[13] *Rose v. Lee*, No. 00-12, 00-11, 2001 WL 558079, at * 9-10 (4th Cir. May 24, 2001) (citing *Williams*, 529 U.S. at 395-399, 415, 418-19). State court factual findings, however, are still subject to the deferential standards in 28 U.S.C. § 2254(e)(1). *Appel*, 250 F.3d at 210; *see also Rose*, 2001 WL 558079, at 10-11 (using state court's factual findings to determine de novo merits of ineffective assistance of counsel claim).

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[13] The Third Circuit Court of Appeals has not specifically addressed the question of the applicable standard of review in cases where the state court decision is contrary to or an unreasonable application of federal law. The Third Circuit has held, however, that where the state court fails to adjudicate or address the merits of a claim raised by the petitioner, the reviewing court does not apply AEDPA's deferential standards, but rather "exercise[s] plenary review over state court conclusions on mixed questions of law and fact and pure issues of law." *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001). The Court determines that this plenary review also applies where a state court decision addresses the merits of a particular claim but is deficient under the § 2254(d) standards.

Accordingly, the Court will continue to apply the statutory deference to the state court's factual findings except with respect to those findings that the Court has already determined were unreasonable in light of the evidence available to the state court.

A Batson analysis proceeds in three steps: (1) the defendant must make a prima facie showing of a violation; (2) if the defendant succeeds, the prosecution must articulate a race-neutral explanation; and (3) the court must then determine whether the defendant has proven purposeful discrimination. *Simmons v. Beyer*, 44 F.3d 1160, 1167 (3d Cir. 1995). At the threshold, the Court defers to the Pennsylvania Supreme Court's determination that Petitioner established a prima facie case under *Batson*, and thus successfully raised an inference of racial discrimination by the prosecutor. *See Hardcastle*, 701 A.2d at 548. Even if deference is unnecessary, the Court agrees that the relevant circumstances of Petitioner's case clearly establish a prima facie case of discrimination.

Batson states that to establish a prima facie case of discriminatory jury selection the defendant must show that he is a member of a cognizable racial group, the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race, and sufficient facts exist to raise an inference that "the prosecutor used that practice [of peremptory challenges] to exclude the veniremen from the petit jury on account of their race." *Batson*, 486 U.S. at 96. In connection with the prima facie case, *Batson* permits the defendant "to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate." *Id.* Courts examine several factors when determining whether a prima facie case has been established: (1) the number of racial

group members in the panel; (2) the nature of the crime; (3) the race of the defendant and the victim; (4) a pattern of strikes against racial group members; and (5) the prosecution's questions and statements during the voir dire. *United States v. Clemons*, 843 F.2d 741, 748 (3d Cir. 1987); *see also Batson*, 486 U.S. at 97.

Neither party disputes that Petitioner is African-American and thus is a member of a cognizable racial group, and that the prosecutor exercised peremptory challenges of jurors of Petitioner's race. *See* Commw. Pet. to Vacate and Recons. Dec. 1, 1983 Order, Granting Def.'s Mot. for New Trial and Granting Reargument Thereon ¶ 5(d). Although Petitioner and the victims are of the same race and the crime contains no apparent racial overtones, the relevant circumstances support a finding that Petitioner successfully established a prima facie case. The prosecutor exercised a very large proportion of her peremptory challenges against African-American jurors, twelve out of fifteen. Given that only fourteen African-Americans sat on the venire,[14] this pattern of strikes is highly suspicious. Furthermore, the prosecutor made a revealing statement during voir dire questioning that supports an inference of discrimination. Juror number 35, Gisela Broughton, expressed uneasiness about Petitioner's race during her voir dire questioning. N.T. 11/16/82 at 2.71-2.72. Ms. Broughton had previously been victimized twice, both times by African-Americans. *Id.* at 2.70-2.71. She recognized that Petitioner is African-American and admitted that she felt prejudiced against him on the basis of his race. *Id.* at 2.71 ("I think I am a little

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[14] The Pennsylvania Supreme Court indicates, and the record supports, that the prosecutor excluded twelve of the African-American jurors, Petitioner challenged one juror, and one ultimately sat on the jury. *Hardcastle*, 546 A.2d at 1104-5.

prejudiced right at this point because both times that this has happened, it has been a black person, and I just feel a little bit uneasy about that."); *Id.* at 2.72 ("I was always open minded and all, but since two things happened to me, both times it was black people, I feel a little bit on the prejudiced side.") When Petitioner challenged her for cause, the prosecutor objected. (*Id.*) The prosecutor's support for the retention of a juror who admitted to being racially-biased against African-Americans is probative of the prosecutor's state of mind during voir dire. The fact that one African-American juror sat on the jury in Petitioner's case does not preclude a finding of a prima facie case with respect to the jurors who were excluded. *Simmons*, 44 F.3d at 1167-68. The number of African-American veniremen peremptorily challenged by Petitioner is irrelevant to the issue of whether the prosecutor employed her strikes for discriminatory reasons. Based on all of these circumstances, the Court finds that Petitioner established a prima facie case of discrimination.

The next stage of the inquiry, therefore, is whether the prosecutor advanced a race-neutral reason for each of the strikes. The Court recognizes that at this stage the prosecutor's proffered reasons need not be plausible or credible, but just facially race-neutral. *Hernandez v. New York*, 500 U.S. 352, 360 (1991). The Court has already determined that the Pennsylvania Supreme Court's findings with respect to the existence of a race-neutral reason with respect to any of the twelve African-American jurors were unreasonable in light of the available record. As such, no deference to the state court's findings is necessary. The only statements by the prosecutor about the reasons for her strikes in the record are her professed inability to recall the specific reasons for the strikes and a general denial that the strikes were based on race. N.T. 4/27/83 at 49, 80. These statements are insufficient as a matter of law under *Batson* to constitute a

race-neutral justification. *See Batson*, 476 U.S. at 98. Respondent offers neither explanations for the prosecutor's strikes nor evidence of the prosecutor's state of mind. Accordingly, the Court determines that no race-neutral reasons are present to rebut Petitioner's prima facie case. Under this circumstance, *Batson* requires that Petitioner's conviction be vacated. *Id.* at 100.

Even if the state court's findings of the existence of potential race-neutral reasons for challenging the ten jurors based on their voir dire testimony are accepted and the use of such potential reasons is reasonable under *Batson*, the Court determines that the prosecutor engaged in intentional discrimination with respect to the exclusion of William Preston (Preston"), James Richardson ("Richardson"), Adrienne Marsh ("Marsh"), and Janice Ferrell ("Ferrell").

The state court surmised that the prosecutor excluded Preston and Richardson, both identified as African-American jurors, based on their testimony that family members had been victims of violent crime. *Hardcastle*, 546 A.2d at 1104-1105. Preston and Richardson, however, both testified that they would not be influenced by their prior experiences. N.T. 11/16/81 at 2.6, 2.7; N.T. 11/18/82 at 4.62. Five white jurors also testified that either they or close family members had been victimized by violent crime, but the prosecutor explicitly voiced her approval of them as jurors. *See* Def.'s Mot. for Mistrial ¶ 2; N.T. 11/15/82 at 1.94, 1.96-1.97; N.T. 11/16/82 at 2.3, 2.6, 2.79, 2.81; N.T. 11/17/82 at 32, 34; N.T. 11/18/82 at 4.28, 4.32, 4.60, 4.62, 4.72, 4.74. While recognizing that *Batson* does not compel a finding of intentional discrimination merely because veniremen of different races give similar responses and only one is excluded, *see, e.g.*, *Howard v. Moore*, 131 F.3d 399, 409 (4th Cir. 1997); *Burks*, 27 F.3d at 1427, the Court sees no credible reason why the

prosecutor would find Preston and Richardson distinguishable from the five non-African-American jurors. Casting further doubt on the credibility of such a justification, one of the white jurors accepted by the prosecutor had himself been convicted of a crime of violence. N.T. 11/18/82 at 4.32. Furthermore, both Preston and Richardson were otherwise indistinguishable from another white juror who was accepted by the prosecutor. *See* N.T. 11/16/81 at 2.4-2.8; N.T. 11/18/82 at 4.22-4.27, 4.60-4.65.

The state court justified the exclusion of Marsh, another African-American juror, because she had heard about the case through the media. *Hardcastle*, 546 A.2d at 1104. The Court rejects this justification. Marsh stated that she would reach a verdict based on the evidence presented at trial and would not be influenced by any prior knowledge of the case. N.T. 11/16/82 at 2.10. The prosecutor explicitly accepted a white juror who also testified to have read media reports about the crime. *See* Def.'s Mot. for Mistrial ¶ 2; N.T. 11/16/82 at 2.8, 2.9-2.10; N.T. 11/17/82 at 77-78. Similar to a juror who sat on the petit jury in Petitioner's case, Marsh lived in Mount Airy and was married with adult and teenage children. N.T. 11/15/82 at 1.95, 1.100; N.T. 11/16/82 at 2.9, 2.12. Marsh also stated clearly that she had no beliefs that would prevent her from imposing the death penalty in an appropriate case and that she would follow the law as explained by the judge. N.T. 11/16/82 at 2.8, 2.13-2.14.

The Pennsylvania Supreme Court justified Ferrell's exclusion on the grounds that she was a twenty years old, unemployed high school graduate, who lived with her mother and had never before served on a jury. *Hardcastle*, 546 A.2d at 1105. These reasons taken individually or collectively are also insufficient to rebut the inference of discrimination. The prosecutor, however, accepted several young single women

who lived at home with their parents. *See* N.T. 11/17/82 at 53-55; N.T. 11/19/82 at 5.84-5.86. Furthermore, the prosecutor accepted an unemployed juror who lived with his family, had been convicted of a violent crime, and had a family member who had been a victim of violent crime. N.T. 11/18/82 at 4.28-4.33. For these reasons, the Court rejects the state court's proffered justifications and finds that Petitioner has established intentional discrimination with respect to Preston, Richardson, Marsh, and Ferrell.

The Court also finds as fact based on the record that the prosecutor engaged in intentional discrimination with respect to the two jurors for whom no record-based potential reasons were found, Kim Richards and Lisa Stewart. Lisa Stewart testified that she was a housewife with one child living in west Philadelphia, and that she would follow the law and weigh the evidence fairly. N.T. 11/15/82 at 1.114-1.116. Several white female jurors who the prosecutor explicitly found acceptable also testified to being homemakers with children and living in Philadelphia. *Id.* at 1.94-1.95, 1.100; N.T. 11/18/82 at 4.65-4.67, 4.71; N.T. 11/19/82 at 5.99-5.101, 5.106. Kim Richards testified that she was a single, 26-year-old college graduate who lived in Overbrook and worked as a secretary for an extermination business. N.T. 11/17/82 at 93, 96. The prosecutor struck Richards while retaining a single 25-year-old white female juror who had attended two years of college and worked as an accountant for an insurance company. *Id.* at 96; N.T. 11/19/82 at 5.84-5.87. The record reveals no credible basis other than race for distinguishing between Stewart or Richards and their respective white counterparts.

Accordingly, the Court concludes that Petitioner has established that intentional discrimination occurred with respect to six prospective jurors. Since *Batson* requires

reversal of a conviction where even a single juror was excluded for an impermissible reason, the Court determines that the habeas writ must be granted. *See Batson*, 476 U.S. at 100; *see also J.E.B. v. Alabama*, 511 U.S. 127, 142 n.13 (1994).

V. CONCLUSION

In summary, the Court determines that the Pennsylvania Supreme Court's adjudication of Petitioner's case resulted in a decision that was contrary to, and involved an unreasonable application of, clearly established federal law as defined by the United States Supreme Court in *Batson*, and was based on unreasonable determinations of the facts in light of the evidence presented in the state court proceeding. Upon a plenary review of the record, the Court further concludes that Petitioner is entitled to relief because he established a prima facie case of discrimination and the prosecutor failed to proffer any race-neutral reasons for her peremptory challenges. If the state court's findings of the existence of race-neutral reasons are accepted, the Court alternatively concludes that Petitioner has successfully established that the prosecutor engaged in intentional discrimination with respect to six prospective African-American jurors. The Court, therefore, grants Petitioner a writ of habeas corpus.

The proper relief in this case is a new trial with the opportunity to retry the petitioner before a properly selected jury. *See Simmons*, 44 F.3d at 1171. A new trial is especially appropriate where as here, the passage of time makes a new evidentiary hearing on the petition impossible. *See Bryant v. Spectacle*, 131 F.3d 1076, 1077-78 (2d Cir. 1999). Nearly twenty years have passed since Petitioner's trial, such a length of time that even Respondents admit that an evidentiary hearing on Petitioner's *Batson* claim is unlikely to be

helpful. *See* Commw. Mem. at 126. Accordingly, the Commonwealth may retry Petitioner before a properly selected jury within 180 days of the date of this memorandum. If a date for a new trial is not scheduled within 180 days, Petitioner must be unconditionally released on the charges at that time. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONALD HARDCASTLE, Petitioner	:	CIVIL ACTION
v.	:	**CAPITAL CASE**
MARTIN HORN, et al., Respondents	:	NO. 98-CV-3028

ORDER

AND NOW, this 27th day of June, 2001, upon careful consideration of Donald Hardcastle's Amended Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Doc. No. 24), all attendant and responsive briefing, the state court record, and the oral argument held on February 20-21, 2001, **IT IS HEREBY ORDERED** that said Amended Petition is **GRANTED**. The execution of the writ of habeas corpus, however, is **STAYED** for 180 days from the date of this order to permit the Commonwealth of Pennsylvania to provide Petitioner with a new trial. If Petitioner is not provided with a new trial within the time specified, the writ shall issue, and Respondents shall release Donald Hardcastle from any incarceration or other restraint.

Since Petitioner has made a substantial showing of the denial of a constitutional right, **IT IS FURTHER ORDERED** that a certificate of appealability under 28 U.S.C. § 2253(c)(2) is **GRANTED** as to the issues of whether the prosecutor engaged in intentional discrimination in exercising peremptory challenges and whether the state court decisions addressing that question were contrary to or an unreasonable application of clearly established federal law

as determined by the United States Supreme Court, or were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

BY THE COURT:

/s/
John R. Padova, J.

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IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA

COMMONWEALTH OF PENNSYLVANIA	:	TRIAL DIVISION
	:	CRIMINAL SECTION
vs	:	JUNE TERM, 1982
	:	NOS. 3288-3291
DONALD HARDCASTLE	:	CHARGES: Murder, etc.

MOTION FOR MISTRIAL
PROSECUTORIAL MISCONDUCT

DONALD HARDCASTLE, the defendant herein, by his attorney, WILLIAM A. FITZPATRICK, ESQUIRE, hereby moves for mistrial, discharge of the jury impaneled but not yet sworn, and calls for the impaneling of a new jury by reason of the following:

1. The Commonwealth exercised fourteen peremptory challenges, twelve of which were against black jurors whose elicited background and voir dire answers disclosed no reasons to challenge for cause or to challenge

peremptorily except, as noted, that each of said twelve peremptorily challenged jurors was black.

2. Those black jurors so peremptorily challenged were as follows: Lisa Stewart, Juror #456; William B. Preston, Juror #367; Adrienne Marsh, Juror #293; Kathryn Taylor, Juror #483; Marion Johnson, Juror #178; Shirley Davis, Juror #81; Kim Richards, Juror #322; Gladys Workman, Juror #461; Lorraine Fox, Juror #128; James I. Richardson, Juror #339; Mary E. Henry, Juror #103, Janice Ferrell, Juror #70.

3. Thus, the defendant asserts a denial of due process under both the Pennsylvania constitution and the constitution of the United States of America, in that he was denied free access to a jury of his peers and a denial of the equal protection of the laws.

RESPECTFULLY SUBMITTED,

/s/_____
WILLIAM A. FITZPATRICK
Attorney for Defendant

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF
PENNSYLVANIA

CRIMINAL TRIAL DIVISION

COMMONWEALTH	:	June Term, 1982
	:	Nos. 3288-3293
v.	:	
	:	Arson; Burglary; Murder;
DONALD HARDCASTLE,	:	Voluntary/Involuntary
Defendant	:	Manslaughter

MONDAY, NOVEMBER 29, 1982

ROOM 246, CITY HALL
Philadelphia, Pennsylvania

BEFORE: Honorable George J. Ivins, J., Presiding
and a Jury

APPEARANCES:

Judith Frankel Rubino, Esquire
Assistant District Attorney
for the Commonwealth

William Fitzpatrick, Esquire
Court-Appointed Counsel
Attorney for the Defendant

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(THE FOLLOWING TAKES PLACE IN CAMERA:)

THE COURT: On the record. This case, involving Commonwealth versus Hardcastle, has just been sent down to the Court. The Court has been advised that the matter was scheduled before Judge Malmed. A motion to suppress was heard by Judge Malmed, and then the Court went into the selection of a jury, and the jury selection was completed.

Last Monday, which was November 22nd, 1982, apparently Judge Malmed became somewhat ill. In any event, the case -- I'm just guessing now; counsel can correct me if I'm incorrect -- almost on a day-to-day basis, is that it, or was it just put over till today because of the illness?

MRS. RUBINO: On Monday the jurors reported, as directed, and they were told that the judge was out sick, and they were told to come back on Tuesday. On Tuesday they were told to come back today, that the judge -- he is in the hospital.

THE COURT: In other words, the matter went over until today as a result of the illness of Judge Malmed.

MRS. RUBINO: There was no other judge available.

THE COURT: It is my present understanding that the case has now been assigned to me for the trial, and the jury is presently awaiting our opening of court. But as I understand it, counsel, you have a motion, do you not?

MR. FITZPATRICK: Yes, sir.

THE COURT: Will you make it.

MR. FITZPATRICK: Your Honor, if it please -- William A. Fitzpatrick, attorney for the defendant, Donald Hardcastle.

Your Honor, on Monday morning, prior to the information -- having received the information that the judge was ill, I filed a written motion for a mistrial. The motion was based on the asserted prosecutorial misconduct of the district attorney, and the specific charge was that the Commonwealth exercised 14 peremptory challenges, 12 of which were against black jurors who elicited background and voir dire answers disclosed no reasons to challenge for cause.

THE COURT: Challenge for cause or peremptory? Now there's a difference.

MR. FITZPATRICK: The voir dire disclosed no reason to challenge for cause.

THE COURT: Well, wait. Wait.

MR. FITZPATRICK: And they were peremptorily challenged.

THE COURT: You can't use both words, counselor. Either they were peremptorily challenged or they were challenged for cause.

MR. FITZPATRICK: They were peremptorily challenged, Judge.

THE COURT: Your position is, as I gather it, in your motion, that since counsel -- since the district attorney exercised the peremptory challenges -- I assume there were 20 to each side; am I correct?

MR. FITZPATRICK: Yes, sir.

THE COURT: Since she exercised her peremptory challenges --

MR. FITZPATRICK: 14, sir.

THE COURT: -- 14 against persons of the black race --

MRS. RUBINO: Twelve.

MR. FITZPATRICK: Twelve out of the fourteen, sir.

THE COURT: All right. Twelve out of the fourteen against persons of the black race, it is your position that a mistrial should have occurred -- should be declared because of what?

MR. FITZPATRICK: Because of the fact that there was -- the voir dire showed that there was no reason to challenge for cause. Therefore --

THE COURT: No, no. You keep missing -- that's exactly why I interrupted you.

Are you speaking of a challenge for cause or are you speaking of a peremptory challenge?

MR. FITZPATRICK: A peremptory challenge, sir, but the --

THE COURT: You mean no reason was given?

MR. FITZPATRICK: That's right.

THE COURT: Let me ask you a question, sir, and I'll be able to dispose of your motion very quickly. Let me ask you a question: Do you have any law, any law, certainly within the jurisdiction of the Commonwealth, and even beyond that, if you desire, present at this time with you that says that this Court can direct the district attorney how to exercise peremptory challenges? Do you have any law that says that?

MR. FITZPATRICK: No, sir.

THE COURT: Then under the circumstances, sir, your motion is denied. There's no use arguing the point. Your motion is denied.

MR. FITZPATRICK: All right, sir.

THE COURT: Let me state the reason for that: One of the basic rules is that a peremptory challenge may be exercised without giving any reason therefore; whatever the rhyme or reason is not for the Court to determine. The only time the Court has a right to determine is if it's a challenge for cause, which is why, counselor, when you spoke of a peremptory challenge without cause I said no, that can't be. A peremptory challenge may be exercised for whatever reason the person exercising that constitutional, or certainly procedural right -- I think it's both -- may feel that he or she desires to exercise it.

Under the circumstances --

MR. FITZPATRICK: I would like to just ask the Court to make brief argument on that.

THE COURT: No need to. If you don't have law there's no need to argue the point.

MR. FITZPATRICK: I would say that I have law, but not on that specific question, your Honor.

THE COURT: Only on that specific point. It's a very narrow issue that this Court has had before it innumerable times.

MR. FITZPATRICK: I would say that the Darden case states that if it does violate due process to exclude people because of race --

THE COURT: Sir, please, you're getting -- I have no way of knowing, and neither do you, on the record that the district attorney excluded because of race. I'm not going to ask her, and I don't think you have a right to ask her, nor does the record show it.

MR. FITZPATRICK: Well, the record -- that's where I -- my statement --

THE COURT: Counselor, I'm not going to argue the point. There's no need to. I'm going to deny your motion. Your record is correct, and we now proceed.

Is there any other motion?

MRS. RUBINO: May I put something on the record with regard to this issue?

THE COURT: No.

MRS. RUBINO: Not in defense.

THE COURT: No.

MRS. RUBINO: Okay.

THE COURT: Now that gets rid of the problem.

Off the record.

* * * * * *

SUPPLEMENTAL BRIEF OF APPELLANT DONALD HARDCASTLE [EXCERPT], DIRECT APPEAL, NO. 40 APPEAL DOCKET 1986 (PA.), FILED DECEMBER 9, 1986

ARGUMENT

I

***Batson v. Kentucky*, decided April 30, 1986, by the Supreme Court of the United States, supports the Appellant's position that the Commonwealth's exercise of peremptory challenges herein unconstitutionally deprived Appellant of a trial by a jury truly representative of the community.**

For 21 years, the Supreme Court had let stand a decision, *Swain v. Alabama*, 380 US 202 (1965), that created an almost insurmountable barrier to a successful challenge to the government's impermissible use of peremptory challenges to remove prospective Black jurors from the jury panel. Quite simply, a defendant alleging lack of a fair cross-section has had to demonstrate systematic exclusion of a group of jurors from the venire, in case after case; i.e., not merely on the facts of his particular case.

Batson v. Kentucky, ___ US ___; 106 S.Ct. 1712 (1986), rejected the evidentiary burden of *Swain* as inconsistent with Equal Protection standards. Now the defendant need only make an evidentiary showing of purposeful discrimination in the selection of the venire by relying solely on the facts in his particular case since, as the Court reasoned, the same Equal Protection principles as are applied to

determine whether there is discrimination in selecting venirepersons also govern the State's use of peremptory challenges to strike individual jurors. *Batson* at 1718.

The State can exercise peremptory challenges as long as the reason is related to its view regarding the outcome of the case to be tried. However, the Equal Protection clause forbids prosecutors to challenge potential jurors solely on account of their race or on the assumption that Black jurors as a whole will be unable impartially to consider the State's case against a Black defendant. *Id* at 1719.

A defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury (based solely on the facts of his case) by showing that he is a member of a cognizable racial group and the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race; the defendant may rely on the fact that peremptory challenges constitute a jury practice that permits "those to discriminate who are of a mind to discriminate".

Finally, the defendant must show that the preceding factors and other relevant circumstances raise an inference that the prosecutor used that practice to exclude from the venire, members of the defendant's race. An inference of purposeful discrimination is thus established and the burden then shifts to the State to come forward with a *neutral* explanation for challenging Black jurors although said explanation need not rise to the level justifying exercise of a challenge for cause. *Id* at 1722-1723.

In the instant case, Petitioner-defendant's contention that the Commonwealth's use of peremptory challenges unconstitutionally deprived him of a trial by jury

representative of the community is strengthened by the holding in *Batson* as applied to the facts of the instant case.

Petitioner-defendant, as had petitioner in *Batson*, has urged the Court to reject *Swain* and follow the less burdensome evidentiary decisions of other states such as *People v. Wheeler*, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978) and *Commonwealth v. Soares*, 377 Mass. 461, 387 NE2d 499, cert. denied, 444 US 881, 100 S.Ct. 170, 62 L.Ed2d 110 (1979).

(It should be noted that *Batson*, as was *Swain*, was decided on the application of Equal Protection principles and not on any Sixth Amendment argument. *Batson* at 4, 1716).

Petitioner-defendant has also established a record that complies not only with *Batson's* threshold duty as outlined supra but also satisfies the requirement of a record indicating discrimination in the jury selection of the defendant's own case as delineated in *Commonwealth v. Crenshaw*, 504 Pa. 33, 470 A2d 451 (1983).

In the instant case, the *record* establishes the following:

1. The subject issue was timely raised by Appellant's counsel, in writing, in proper context, and with supporting factual allegations, including the list of Black jurors so challenged peremptorily by the Commonwealth, noting name and number. (See Exhibit "C" in original Brief).

2. The actual number of Black persons peremptorily challenged (12 out of the total of 14 of peremptory challenges) exercised by the Commonwealth is admitted three times by the latter's attorney *in the* record herein:

a) in paragraphs 5(c) and 5(d) of the Commonwealth's Petition to Vacate and Reconsider, filed and attested to by the Commonwealth counsel (Exhibit "D" in original Brief);

b) at the argument on post-trial motions, most explicitly on Page 46 of the Notes of Testimony thereof, (Exhibit "E" of original Brief);

c) prior to swearing the jury on November 29, 1982, in an on-the-record *in camera* meeting with the trial judge (see pp. 6&7 Exhibit "F") where the subject issue was raised, argued and preserved.

Thus, Appellant herein met his threshold duty under *Wheeler* and its progeny, and now under *Batson* and even under the emerging Pennsylvania doctrines. Recently, in *Commonwealth v. Crenshaw*, ___Pa___, 470 A2d 451 (1983), the Supreme Court refused to grant relief to a defendant because he ". . . did not establish the race of the veniremen on the record, making it impossible to determine from the record of the voir dire which prospective jurors were Black and whether there was a basis other than race for excluding them by peremptory challenge". *Id* page 454, citing *Commonwealth v. Futch*, 492 Pa 359, 424 A2d 1231 (1981) and *Commonwealth v. Henderson*, 497 Pa 23, 438 A2d 951 (1981).

3. There are no reasons on the record of the voir dire to explain why twelve Black venirepersons were challenged peremptorily, thus leaving only one conclusion: the Commonwealth wanted to exclude the latter by reason of their race.

Said record has been fully preserved for appeal and has been summarized and before the Supreme Court of Pennsylvania since October 7, 1985, as a Brief for Appellant with specific points and exhibits outlined therein.

This Court then should grant Appellant a new trial as his case comes within the purview of *Batson*.

* * * * * *

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the convictions herein be reversed as well as the judgments of sentence of the Court of Common Pleas and that this Supreme Court grant Appellant a new trial.

Respectfully submitted,

/s/_____

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Supreme Court, U.S.
FILED
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NO. 04-448

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN A. HORN, Secretary, Pennsylvania DOC;
GEORGE R. WHITE, Superintendent, SCI-PITTSBURG, and
JOSEPH P. MAZURKIEWICZ, Superintendent, SCI-ROCKVIEW,

Petitioners,

v.

DONALD HARDCASTLE,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Should this Court grant certiorari review of a *non-final order* in a capital habeas corpus case when the only ostensible exigency supporting interlocutory review relates to a discovery dispute, which is pending before the Court of Appeals?

(Not Answered below)

2. Was the Pennsylvania Supreme Court's decision denying relief under Batson v. Kentucky, an unreasonable application and/or contrary to that decision, when it found a *prima facie* case of discrimination in jury selection; the prosecution failed to offer any reasons – much less race neutral ones – for the strikes of two of the stricken African American jurors; and the Pennsylvania Supreme Court identified no such reasons.

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit)

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COUNTERSTATEMENT OF THE CASE[1]

Respondent, Donald Hardcastle, is a prisoner who was sentenced to death in the state courts of the Commonwealth of Pennsylvania. After unsuccessfully litigating a claim under Batson v. Kentucky, 476 U.S. 79 (1986), on direct appeal and in state post-conviction proceedings, Mr. Hardcastle filed a *Petition for a Writ of Habeas Corpus* in the United States District Court for the Eastern District of Pennsylvania. Hardcastle v. Horn, No. 98-CV-3028 (E.D. Pa. 1998) (Hon. John R. Padova, J.). The Petition presented his Batson claim and other claims for relief. Following submission of briefs and related pleadings, and two days of oral argument, the District Court found that the trial prosecutor engaged in intentional discrimination in the selection of Mr. Hardcastle's jury; that the Pennsylvania Supreme Court's resolution of this claim was contrary to, and an unreasonable application of, Batson; and granted the writ. Hardcastle v. Horn, 2001 WL 722781 (E.D. Pa. June 21, 2001) (hereinafter "DCO").

Current Petitioners, the Commonwealth of Pennsylvania (represented by the office of the Philadelphia County District Attorney), appealed to the United States Court of Appeals for the Third Circuit. A unanimous panel of that Court agreed with the District Court's finding that the Pennsylvania Supreme Court's decision denying the Batson claim was an unreasonable application of and contrary to Batson. However, two members of the panel believed that the District Court erred in not acceding to the prosecutor's request to conduct an evidentiary hearing in the District Court to permit the prosecutor an opportunity to provide race-neutral reasons for her strikes of African American venirepersons, if she could. Hardcastle v. Horn, 368 F.3d 246 (3d Cir. 2004). Therefore,

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[1] The Petition for Writ of Certiorari is cited herein as "*Petition*." Petitioners are referred to as "the Commonwealth." All emphasis herein is supplied unless otherwise indicated.

the matter was remanded to the District Court for purposes of permitting the Commonwealth to provide proof that the trial prosecutor had race neutral reasons for the exercise of her strikes against minority venirepersons. The sole dissenter believed, as did the District Court, that a hearing was not appropriate or required inasmuch as the prosecutor's discriminatory intent was obvious from the record and years before she conceded that she had no recollection of the reasons for her strikes. Id. at 262 (Nygaard, J., dissenting).

On June 14, 2004 in preparation for the evidentiary hearing, Mr. Hardcastle's counsel filed *Petitioner's Discovery Motion*, seeking four forms of discovery: 1) a pre-hearing deposition of the trial prosecutor; 2) her handwritten voir dire notes from this trial; 3) her handwritten voir dire notes from 28 other trials she conducted in capital-eligible homicide cases over the course of her career; and 4) training materials relevant to voir dire used by the Philadelphia District Attorney's office. As explained in the *Motion* these materials were relevant to Steps 2 and 3 of the Batson three-step inquiry. See note 3, below.

On August 3, 2004, the Commonwealth filed its *Response to Motion for Discovery*. It agreed to provide the trial prosecutor's handwritten notes from this trial; claimed that the training materials would be "difficult to find"; and opposed the remaining requests.

On August 17, 2004 the District Court granted Petitioner's *Discovery Motion* and ordered that Petitioner be provided with essentially all of the requested items, and on August 18, 2004 the District Court scheduled the evidentiary hearing for November 18, 2004.

On August 27, 2004 the Commonwealth filed a *Notice of Appeal* to the United States Court of Appeals for the Third Circuit; and a separate *Petition for a Writ of Mandamus*, each challenging

the District Court's discovery order.[2]

In response to these filings, on September 9, 2004 the District Court **vacated the discovery order** and replaced it with an order requiring only that the Commonwealth provide the trial prosecutor's notes from Mr. Hardcastle's trial, and deferred ruling on the remainder of the discovery request.

The Third Circuit has yet to dispose of the Commonwealth's *Notice of Appeal* or *Petition for a Writ of Mandamus*.

REASONS FOR DENYING THE PETITION FOR CERTIORARI REVIEW

I. THE JUDGMENT FOR WHICH THE COMMONWEALTH SEEKS CERTIORARI REVIEW IS NOT FINAL. ITS REASONS FOR SEEKING INTERLOCUTORY CERTIORARI REVIEW RELATE TO AN UNRESOLVED DISCOVERY DISPUTE THAT IS NEITHER WORTHY OF, NOR RIPE FOR, THIS COURT'S REVIEW.

Although this Court may exercise its certiorari review over non-final judgments of a Court of Appeals, "except in *extraordinary cases* the writ is not issued until final decree." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 252, 258 (1916):

> [T]his Court should not issue a writ of certiorari to review a decree of the circuit court of appeals of an appeal from interlocutory order, unless it is necessary to prevent *extraordinary inconvenience and embarrassment in the conduct of the cause.*

American Construction Co. v. Jacksonville, T. & K.W. Ry., 148 U.S. 372, 384 (1893).

The Commonwealth seeks to justify its request for interlocutory certiorari review because of the "immediate harm" it alleges that has been, or will be, caused by the District Court's discovery order. (*Petition* at 2.) Yet, there is nothing "extraordinary" about this situation. The Commonwealth's complaints about the discovery ordered by the District Court – which in any event

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[2] These actions were docketed in the Court of Appeals as Hardcastle v. Horn, No. 04-CV-9018 (3d Cir.) and In re: Martin Horn, No. 04-CV-9017 (3d Cir.), respectively.

was vacated and is nonetheless being appealed to the Court of Appeals – are grossly exaggerated. The discovery dispute about which the Commonwealth complains is hardly momentous. The District Court initially granted a deposition and required that the Commonwealth locate the trial prosecutor's voir dire notes from 28 prior homicide cases as well as any training materials related to voir dire. Such a discovery order would barely merit this Court's intervention, even if presented as part of a final judgment. But, the Commonwealth's request for certiorari review comes to this Court motivated by an unresolved discovery dispute (the discovery order complained of was **vacated by the District Court**, and in any event, the dispute is currently before the Court of Appeals, which has yet to rule on the *Mandamus Petition* or set a briefing schedule regarding the *Notice of Appeal*), and as part of litigation that is not yet final (Mr. Hardcastle's *Petition for a Writ of Habeas Corpus* has not been finally litigated).[3]

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[3] Mr. Hardcastle believes that the District Court's initial discovery order was proper, and he intends to defend it before the Court of Appeals. As an initial matter, there can be little doubt that Mr. Hardcastle has "good cause" for his request because the "specific allegations before the court show reason to believe that [he] may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief" on his Batson claim. Bracy v. Gramley, 520 U.S. 899, 908-09 (1997) (quoting Harris v. Nelson, 394 U.S. 286, 299 (1969)). This Court has made clear that "evidence relating to a pattern and practice of race discrimination in the *voir dire* by the [local] District Attorney's Office," including office evidence of discriminatory office policies to which the trial prosecutor may have been exposed, is relevant in assessing the credibility of the prosecution's race-neutral explanations for its strikes of black jurors. Miller -El v. Cockrell, 537 U.S. 322, 347 (2003); id. at 334-35 ("Of more importance [then anecdotal testimony of bias provided by former prosecutors], the defense presented evidence that the District Attorney's Office had adopted a formal policy to exclude minorities from jury service"; the Court cites a training manual as evidence of that policy). This is precisely the type of discovery that Mr. Hardcastle has sought and that the District Court initially granted.

Moreover, the specific *types* of information Mr. Hardcastle has sought have long been recognized as relevant in proving discrimination. For instance, the trial prosecutor has admitted keeping track of the race of jurors in this and several other capital cases, and the Philadelphia District Attorney's office has neither denied that jury selection notes exist from her other capital prosecutions nor that she also kept track of the race of jurors in those cases. The simple fact that

Therefore, this case is obviously far from final. Mr. Hardcastle is still incarcerated on Pennsylvania's death row, awaiting the evidentiary hearing that was initially scheduled for November 18, 2004, but which has been postponed pending this Court's resolution of this *Petition*, and the discovery dispute currently in the Court of Appeals.

This case presents neither a final decree nor a set of extraordinary circumstances that would merit this Court's interlocutory intervention. The Writ should be denied for this reason alone.

II. The District Court and Court of Appeals Correctly Decided that the Pennsylvania Supreme Court's Disposition of Mr. Hardcastle's Jury Discrimination Claim Unreasonably Applied and/or Was Contrary to Batson v. Kentucky, 476 U.S. 79 (1986).

There are many reasons why the District Court and Court of Appeals correctly held that the Pennsylvania Supreme Court's determination of Mr. Hardcastle's claim that the Philadelphia District Attorney's office discriminatorily struck African-American jurors in this case was contrary to and/or an unreasonable application of clearly established constitutional law set forth by this Court in Batson v. Kentucky, 476 U.S. 79 (1986).

First, the record clearly establishes that Mr. Hardcastle has proven a *prima facie* case under Batson; the prosecution has presented no race-neutral reasons for its strikes; the trial prosecutor has long ago conceded that she cannot provide reasons for her strikes; and the apparent reasons invented

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Ms. Rubino habitually kept track of the race of the venire is itself evidence of discriminatory intent. Miller -El, 537 U.S. at 347 ("The supposition that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards."). Further, it provides substantive evidence of the race of jurors in the cases Mr. Hardcastle has used to develop statistically significant evidence of the prosecutor's career-long pattern and practice of discriminatorily striking black jurors. This historical pattern and practice of racial bias in jury selection is highly relevant to this Court's Step Three analysis under Batson and would certainly provide relevant evidence that whatever explanations the prosecution ultimately propounds for her striking 86% of all black jurors, but leaving a token black juror to serve in this case, were pretextual and lack credibility.

by the Pennsylvania Supreme Court after the fact are clearly pretextual. If this alone does not entitle Mr. Hardcastle to a new trial (as the District Court initially held), it at the very least requires an evidentiary hearing (as the Court of Appeals held). Second, as both the District and Circuit Courts agreed, the process by which the Pennsylvania Supreme Court denied relief on this claim was riddled with procedural and substantive defects.

After accepting that Mr. Hardcastle had satisfied his Step One obligation under Batson's three-step analysis[4] (i.e., he presented a *prima facie* case), the state court improperly relieved the Commonwealth of its Step Two burden of producing the prosecutor's own clear and specific race-neutral explanations for her strikes and failed to conduct *any* Step Three inquiry whatsoever.[5]

At Step Two, the state court exempted the prosecution from its obligation to articulate the prosecutor's "clear and reasonably specific" race-neutral explanations, Batson, 476 U.S. at 98 n.20, for striking more than 85% of the available African-Americans and the only Latino in the venire. Instead, it conducted its own *post hoc* review of the voir dire transcripts and invented its own apparent reasons that a hypothetical prosecutor could possibly have employed to justify these strikes.[6] Because the *post hoc* ostensibly race-neutral explanations invented by the Pennsylvania

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[4] See Miller-El v. Cockrell, 537 U.S. 322, 338 (2003).

[5] The Pennsylvania Supreme Court itself acknowledged that Mr. Hardcastle presented a *prima facie* case of discrimination. See Commonwealth v. Hardcastle, 549 Pa. 450, 465, 701 A.2d 541, 548 (1997). This was not a difficult finding. The prosecutor used 12 of her 14 peremptory strikes against African American venirepersons and the jury that convicted Mr. Hardcastle consisted of 11 whites and 1 African American.

[6] The record is clear that in more than two decades of litigation, the Philadelphia District Attorney's Office has never presented to any court the trial prosecutor's actual reasons – race-neutral or otherwise – for peremptorily striking 86 percent of all the black jurors that she had an opportunity to accept or strike in this case. On the contrary, the trial prosecutor admitted on the record *twenty-one years ago* that she struck 12 of 14 jurors she believed were black, that she

Supreme Court were not the trial prosecutor's actual reasons and, therefore, did not reflect the prosecutor's state of mind when she made the challenged strikes, the District Court held that the state court's decision was contrary to, or an unreasonable application of, Batson. DCO at *10-*11.[7]

As a matter of law, the state court's *post hoc* invention of hypothetical reasons that might conceivably have supported the exercise of peremptory challenges does not constitute a state court "factfinding" of clear and specific reasons that actually motivated the prosecution's peremptory exclusion of 85.71% of eligible black jurors. But even if the state court's substitution of its own unarticulated "apparent" reasons for reasons actually articulated by the prosecution could be considered "factfinding," the Pennsylvania Supreme Court nevertheless failed to provide any explanation for the strikes of two jurors the Court knew were black.

Even after relieving the prosecution of its burden of producing the prosecutor's reasons for her strikes, the state court was unable to invent any "identifiable reasonable basis for a [peremptory] challenge" for the strikes of at least two African-American jurors. Commonwealth v. Hardcastle, 519 Pa. 236, 243-44, 546 A.2d 1101, 1104 (1988). As a result, the state court resorted to justifying

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could not provide any explanations for those strikes, and that it was already impossible to reconstruct the record to provide reasons for her strikes.

Even when the Pennsylvania Supreme Court improperly denied relief or an evidentiary hearing on this claim on direct appeal, that court never set forth any race-neutral reasons that purported to be the actual reasons the prosecutor struck any of the jurors in this case. Instead, the state court engaged in a *post hoc* review of the record to ascertain any hypothetically race-neutral reasons that could have justified a peremptory challenge against black jurors. Even then, the state court was unable to invent any race-neutral reasons for striking two of the black jurors. With respect to these black jurors, the state court simply asserted that these strikes were justified because the prosecution had the opportunity during voir dire to observe the demeanor of those jurors.

[7] The Third Circuit found it unnecessary to address this portion of the state court's decision because it found other aspects of the decision to have unreasonably applied Batson.

these strikes on the grounds that "the Commonwealth had the opportunity to observe the witnesses and their response to questioning prior to exercising the peremptory challenge." Id. at 244, 546 A.2d at 1104. Both the District Court and the Third Circuit found this unreasonable under Batson – and it is manifestly so. This is because this ground was made up by the Pennsylvania Supreme Court. There was simply no evidence, allegation, or proffer made by the Commonwealth at any stage of the proceedings that this was the reason for any of the strikes.

Batson overturned two critical elements of the "crippling burden of proof," 476 U.S. at 92, that Swain v. Alabama,[8] had erected against proof of an equal protection violation for racially discriminatory exercise of peremptory challenges. The first of these elements was the requirement that the defendant establish an extrinsic history of systemic discrimination as a precondition to proving a *prima facie* case of discrimination in the defendant's case. The second core element of Swain that Batson rejected was the presumption that the trial prosecutor "properly exercised the State's [peremptory] challenges." 476 U.S. at 91 (citing Swain, 380 U.S. at 221-22). Batson made clear that "the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" Id. at 96. The Pennsylvania Supreme Court's justification of a challenged strike based solely upon the prosecutor's "opportunity to observe" a prospective juror is not only an unreasonable application of Batson but an evisceration of this presumption.

Finally, once it *sua sponte* invented possible reasons a hypothetical prosecutor might strike some (but not all) of the black jurors in this case, the state court ended its inquiry altogether with no Step Three consideration of the credibility or pretextual nature of these justifications. Thus, the

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[8] 380 U.S. 202 (1965).

Third Circuit correctly determined that –

> even assuming *arguendo* that it was appropriate in this case for the Pennsylvania Supreme Court to sift through the trial record in an effort to identify unstated race-neutral bases for challenged peremptory strikes, the court failed to either (1) identify a satisfactory step two explanation for the striking of Venirepersons 11 and 12, or (2) conduct an adequate step three analysis as to any of the African-Americans struck from the venire. Thus, even accepting the Pennsylvania Supreme Court's proffered justifications as facially valid, we are still unable to conclude that its resolution of the matter is an objectively reasonable application of *Batson*.

368 F.3d 246, 257 n.4.

The District Court went on to conduct a thorough Step Three analysis describing the pretextual nature of the state court's invented justifications and granting relief without need for a evidentiary hearing two decades after the prosecutor indicated she could not recall why she struck any juror. The Third Circuit remanded for an evidentiary determination at Steps Two and Three.

CONCLUSION

Petitioners seek interlocutory review of a routine Batson decision. The decision is not final, as an evidentiary hearing still must be held. The discovery dispute that is apparently agitating the prosecution is itself neither onerous, nor final. Unless Mr. Hardcastle is to be granted a new trial on the state of the present record, there must be an evidentiary hearing at which the prosecution attempts to meet its Step Two burden under Batson. And if the prosecution is permitted to present "race-neutral" reasons twenty years after the trial prosecutor represented that she could not provide any, Mr. Hardcastle is entitled under Step Three to fully rebut the prosecution's presentation and demonstrate why these reasons are pretextual.

This case is far from worthy of this Court's review at this time. Certiorari should be denied.

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Certificate of Service

I, Robert Brett Dunham, hereby certify that on this 16th day of November, 2004 I served a copy of the foregoing *Brief in Opposition to Petition for Writ of Certiorari* upon the following person by United States Mail, first class, postage prepaid:

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